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S. HRG. 99-491

CLEAN CAMPAIGN ACT OF 1985

mf 143

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1310

TO AMEND THE COMMUNICATIONS ACT OF 1934 REGARDING THE BROADCASTING OF CERTAIN MATERIAL REGARDING CANDIDATES FOR FEDERAL ELECTIVE OFFICE, AND FOR OTHER PURPOSES

SEPTEMBER 10 AND OCTOBER 8, 1985

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Committee on Commerce, Science, and Transportation

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CLEAN CAMPAIGN ACT OF 1985

TUESDAY, SEPTEMBER 10, 1985

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The committee met, pursuant to notice, at 9:33 a.m., in room SR-253, Russell Senate Office Building, Hon. John Danforth (chairman of the committee) presiding.

Staff members assigned to these hearings: Dan Phythyon, staff counsel, and Tom Cohen, minority staff counsel.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. This is the first of several hearings on the subject of S. 1310, the Clean Campaign Act of 1985, which was introduced some weeks ago by Senator Hollings, me, and a number of other Senators.

This hearing will not focus on the Clean Campaign Act of 1985 in and of itself, but on the general question of what has happened to political campaigns in this country. When Senator Hollings and I began discussing the problem of political campaigns, we went through a long process of reviewing various alternatives as far as legislation is concerned.

I don't think that either of us has the sense that this bill is in any way locked in concrete. One of my concerns is that when you put forth any suggested legislative remedy, the focus is on your bill itself rather than on the general problem it addresses.

I do think this bill is a good bill. It certainly raises constitutional questions, and we are sensitive to that. We have obtained a legal opinion, which will be described later by witnesses, that states that there are strong constitutional arguments in favor of the bill.

The general question for today is what has happened to the political process as a result of television advertising, particularly the advent of 30-second commercials, which tend to be extremely negative, and as a result of the creation of so-called independent political action committees or even individual interlopers. This was the case in the Illinois campaign in 1984, where an individual came in with something like $1.6 million, which he was willing to spend on negative advertising in the last few weeks of the campaign against Senator Percy.

It seems to me that 30-second commercials are corrupting the political process and that the heavy weight accorded to interlopers coming in with seemingly unlimited funds in the last few weeks of races is throwing off any sense of balance in political campaigns.

A candidate can be fully prepared to meet his opponent and may have raised tremendous funds in very small increments to do so. Then the candidate discovers in the last few weeks that there is a third party in the race, and the third party is running hundreds of thousands or millions of dollars worth of negative political commercials, and there is now no practical or effective way to respond to them.

Those of us in the Senate and those who have watched the Senate also have noticed a degree of nervousness, concern, and sometimes meanness of spirit which has undercut the collegiality which we like to believe exists in this body. I think part of the reason for that is negative advertising.

The fact is that we are defensive, we are so concerned that everything we do and everything we say can be fodder for a 30-second commercial in the next campaign. Some of you may have noticed recently in almost all committees—and I think it is true in this committee—one of the new things happening is that when a Senator leaves the committeeroom, his nameplate automatically is taken down.

Why is that? Well, the reason is the concern that somebody is going to run a commercial in the next campaign, just a picture of an empty chair with the nameplate in front of it.

Something has gone terribly wrong with the political system. What we have attempted to do in this legislation is to develop some remedies which do not cut off speech. But open up speech, open up the ability to respond, the ability to defend oneself. In the case of a candidate making a negative attack, we try to improve the sense of responsibility and accountability by making it clear that the candidate who makes the attack should appear with his own face, with his own voice.

Right now, we require that political commercials be identified as political commercials, but this can be done in a matter of seconds. The preceding commercial was paid for by Danforth for Senate campaign, or whatever. That is all it takes.

We feel, Senator Hollings and I, that if you are going to make a negative attack, you should at least have to disclose that this is in fact the responsibility of the candidate making the attack.

But again, the point of this hearing is not so much this particular bill. Maybe it is a great bill; maybe it is not. But I think the most important thing is for us to begin public debate in this country about what we want out of our political system and what we expect of our political system.

I think we in this country should begin asking the question, is the present state of political campaigns what we want in America? Is this what we deserve from the democratic process, or has something gone terribly wrong? With or without legislation, I think if we focus on the problem, something good is going to happen. I think that even without legislation—and I hope we can address it legislatively—but even without, public pressure will build for political campaigns that are of a higher quality and higher level than what we see today.

Senator Hollings?

OPENING STATEMENT BY SENATOR HOLLINGS

Senator Hollings. Mr. Chairman, you have covered it extremely well, the sense of misgiving that you and I both have. We are not only legislators; we are lawyers; we are constitutionalists. We concern ourselves about the freedom of press and any restriction. And when you come down to what we would characterize as negative, the next fellow would characterize as positive.

And it is with those misgivings in mind that we start out on the particular course trying to affix the responsibility in the campaign itself. Specifically, if I run against Senator Danforth and I buy a half hour, the station is encumbered to call up Senator Danforth and say, your opponent has bought a half hour and you are entitled to a half hour.

But if I am the Citizens Committee for Disrupting Politics, I just buy the half hour and they don't call Senator Danforth and tell him anything. And all of a sudden, he is broadsided; he is not given necessarily equal time. It is quite obvious when someone spends a million six, like in Illinois, that it is more than many of us spend for the entire campaign.

In addition to that, I might be a little more than candid and say, my thrust is not just for fairness and the higher order of the discussion in campaigns as a goal, but more particularly trying to harbor in the broadcast media for the public good. If I were king for a day, I would try to say each candidate would be given a certain amount of time and be required to appear in the usage of their time.

Specifically, in Great Britain, the time is allocated amongst the parties, the parties allocate it to the candidates, and the candidates do appear. I don't think we can get the British system in this bill, and in fact I am trying to find out from you, the witnesses here who will be appearing, how do I approximate that goal?

I would like to start off with the premise that the public airwaves are just that, belonging to the public, and the least the media could do would be to contribute a certain amount of time in important campaigns, the national races, or the Presidential races, over a limited period of time, and therein not only would you bring about a balance as the Chairman was talking about, a degree of fairness, but a shortening of the campaigns themselves.

And really, the campaign doesn't pick up until we start on television. We all know that. It is the deluge at the last minute when you can finally get the public's attention in October, before the November election.

So I thought I might just express my hopes of trying to approximate some way of an allocation of time, not just for debates, but some way, if we could ever figure it out, to limit that time and allocate it in an equal amount to the candidates involved with, as this bill provides, the candidates appearing therein.

But you can see, with the expressions of our Chairman and myself, that we don't think we found a solution in this bill. We are using this bill as a vehicle to really bring about a solution and a higher order of campaigning in this country.

Thank you, Mr. Chairman.

The Chairman. Thank you, Senator Hollings.

Senator Gore?

OPENING STATEMENT BY SENATOR GORE

Senator **Gore**. Thank you very much, Mr. Chairman.

I want to commend you and Senator Hollings for holding these hearings. Media advertising and campaigns has become the center of an increasing controversy, and I am interested in the testimony we will hear; I am looking forward to listening carefully and keeping an open mind about potential solutions.

I have long felt that broadcasters should make available a time for competing views in political campaigns free of charge, as a condition of their licenses. I must say in all candor that I am concerned about any effort to regulate the content of free speech, and I know that the authors of this bill are very sensitive to those problems as well, and one of the reasons for this hearing and dialog is to look at possible solutions that would not in any way run afoul of the first amendment.

Finally, let me just say that I am keenly interested in the statement which I understand is to be submitted by my predecessor and I urge the attention of all my colleagues, as I am sure is unnecessary to urge because of Senator Baker's long experience in these areas and many others. And I appreciate the chance to be here.

The **Chairman**. Thank you, Senator Gore.

Senator Packwood?

OPENING STATEMENT BY SENATOR PACKWOOD

Senator **Packwood**. Mr. Chairman, I don't think the issue is whether the campaigns have become more vicious, scurrilous, slanderous. Anybody who looks at past campaigns in this country, especially those in the 19th century, will be hard pressed to find anything currently that by a half equals the vilification and slurs of those campaigns.

The allegation about Grover Cleveland and the illegitimate child, and the campaign slogan of the Republicans—"Ma, Ma, where's my Pa? Gone to the White House; ha, ha, ha!"—is something most of us have not yet had to face. And "Rum, Romanism and Rebellion" is hardly designed to quiet people's fears about those who are going to attempt to overthrow the Government and the Constitution.

What has happened is that broadcasting has made the message more imminent and the message can be put across in a much shorter period of time, with greater difficulty for response. As is true with so many problems that this country faces, and business faces especially, with a very limited amount of self-restraint, the problem would go away.

Broadcasters today, radio and television, are not required to accept ads offered by independent campaigns, period. There is no requirement in the law; there is no requirement of the Federal Communication Commission; there is no requirement of the courts that compels them to accept those types of ads. Not the $1.6 million worth of ads tendered against Senator Percy and not, apparently, the $1½ million worth of ads that will be tendered against me by Right to Life and their allies in my primary campaign.

The only ads that the broadcast medium has to accept are ads of the candidate's committee. And if the candidate wanted to participate, himself or herself, in scurrilous, low-level attacks and stand behind them himself or herself, I think the public would very soundly defeat that candidate.

As far as I am concerned, I would have no limitation on what broadcasters can accept or not accept. I would have no limitation upon what they can put on the air, short of their wanting to run the risk of libel or slander suits.

I think that the broadcast media is now so diverse that they should be totally deregulated, which is not to say that the airwaves are not the public's. They are the public's. The question is, what is the best use to which the public should put them?

I would say this to my friends in the broadcast industry. I don't know if the bill that the Senator from Missouri and the Senator from South Carolina is constitutional or not. I am frankly at sea as to whether the court may or may not find to be constitutional either the statutory rules or the administrative rules of the Federal Communications Commission. But I know full well that there is sweeping this Congress—not yet this country, but this Congress—a revulsion, a justified revulsion at the unethical, immoral, 30-second and 60-second commercials proffered by independent committees.

And if the broadcast industry itself does not find a way to themselves regulate or prohibit ads except from the candidates' committees, I think Congress will try to. And when we try, if we pass it, the issue will go to court. But it never has to get to that stage if the broadcast media would exercise restraint.

[The statement follows:]

OPENING STATEMENT BY SENATOR PACKWOOD

I wish to thank my colleague, Senator Danforth, for conducting this hearing today on S. 1310, the "Clean Campaign Act of 1985."

As Senator Danforth has stated, his bill amends the political broadcasting section of the Communications Act, to provide free air time for political ads under two circumstances: First, if a Federal candidate refers to his or her opponent in a political advertisement, but does not do so personally, the broadcasting station which chooses to run the ad must provide free response time to the opposing candidate referred to in the advertisement. Secondly, if a broadcasting station airs an ad purchased by a political action committee or by an individual, either supporting or opposing a candidate, the broadcaster must give the opposed candidate or the opponents of the support candidate equal time for free.

My concern with Senator Danforth's bill is that it would improperly restrict the content of political speech—speech that is at the core of the first amendment and thus deserving of the greatest constitutional protection.

I understand Senator Danforth's concern with negative political campaigning. Negative campaigning has always existed in American politics, however. In fact, the writers of our Constitution intended to protect all forms of political expression, including scathing, attacking commentary.

There were only eight daily newspapers in this country when our Founders adopted the first amendment. And those eight publications were partisan, slashing, passionate publications. There was no balance in those publications. They were pro-Federalist or anti-Federalist, and indeed they were vitriolic. They attacked the incumbent politicians. But the incumbent politicians of that day recognized that freedom of expression was so dear to the preservation of a free government, so necessary as an effective check against the abuses of government that they unequivocally declared that Congress should pass no law that abridged the freedom of the press.

Such unequivocal freedom from governmental interference should be extended to the electronic media. Traditionally, the U.S. Supreme Court has afforded limited first amendment protection to the broadcast media because of the scarcity of broadcast frequencies. Because of this scarcity, the Federal Communications Commission (FCC) has had authority to impose content controls, such as the fairness doctrine, on the broadcast media.

The U.S. Supreme Court, however, in two carefully worded footnotes to its *FCC* v. *league of Women Voters of California* decision has indicated a willingness to reexamine the validity of the scarcity rationale which underlies all of the FCC's content controls, and a readiness to reinvestigate the possibility that the fairness doctrine has a "chilling effect" on protected rights of free expression. On the constitutionality of the content restrictions, the court stated: "As we recognized in Red Lion . . . were it shown by the Commission that the fairness doctrine 'has the effect of reducing rather than enhancing' speech, we would be forced to reconsider the constitutional basis of our decision in that case." The Federal Communications Commission in its filing for the FCC's inquiry into the fairness doctrine has stated that the Commission no longer believes that the fairness doctrine serves the public interest. Rather, the Commission has concluded, on the basis of a voluminous factual record, that the intrusion by Government into the content of programming actually inhibits the presentation of controversial issues of public importance.

For example, several parties which filed formal comments with the FCC, including the Glass Packaging Institute, a trade association of the Container Glass Industry, and the National Rifle Association, indicated that they have experienced difficulty in advertising on various ballot issues because broadcasting fear that these advertisements would require the broadcasting station to assume the financial cost of providing free response time under the fairness doctrine. Because of this fear, broadcasting stations either refuse to sell advertising time or purposely inflate their charge for advertising time to cover the anticipated cost of free response time, This often makes the cost of adverstising unnecessarily prohibitive.

I fear that S. 1310, "The Clean Campaign Act of 1985" would have a similar chilling effect on the airing of diverse political commentary. The Supreme Court has found that a major purpose of the first amendment is to protect the free discussion of governmental affairs—including the discussion of political candidates. The Supreme Court also has made it clear that such protection extends to speech affecting elections, whether the content of that speech is negative or positive. Such robust, uninhibited discussion of public issues is an integral part of our electoral process, and is necessary to ensure an informed voting public.

If a broadcaster must accept the imposition of a financial penalty for every noncandidate sponsored political advertisement aired, that broadcaster will be reluctant to air any political ads purchased by individuals or political action committees, including truthful, non-misleading ads that explore pertinent campaign issues. This would be a disservice to the voting public, which is competent to examine and evaluate opposing viewpoints.

Thomas Jefferson said that democracy cannot work well unless the voters are educated about the issues of the day. When the Founders amended the Constitution for the first time in 1791, they did it to protect the only two forms of communications known: Press and speech. Our Founders were concerned that the freedom of expression be guaranteed. It is time we returned to that standard to guarantee a lively discussion of issues and a revitalization of our electoral process.

The **CHAIRMAN**. Thank you, Senator Packwood.
Senator Gorton?

OPENING STATEMENT BY SENATOR GORTON

Senator **GORTON**. Thank you, Mr. Chairman. As Senator Packwood and others have pointed out, your proposal deals with a very real problem. It deals with the problem of the way in which we will communicate ideas about political campaigns to the people who elect us.

You and others have recognized that these proposals are not only controversial, but that they certainly raise constitutional issues. I agree most particularly with my friend, Senator Gore, when he says that you and everyone else here are sensitive to those constitutional issues and sensitive at the same time to the very, very real problem which this proposal has addressed.

I look forward to hearing comments on this proposal and the suggestions of other proposals to improve the level and the intelligibility and the information carrying methods of communication with respect to political campaigns in this country.

I think you and Senator Hollings have a proposal that merits very, very careful study because it is directed at a real problem and there is a high degree of likelihood that it could be used to help solve that problem.

The CHAIRMAN. Thank you, Senator Gorton.

Senator Ford?

OPENING STATEMENT BY SENATOR FORD

Senator FORD. Mr. Chairman, I will not make a long statement. I have read some history of political campaigns and I agree with Senator Packwood that some of the previous campaigns were fairly rough. But they did not have the ability of television to have it seen several times a day, several times a night, build that imagery into it. And so our times are different.

And I compliment the chairman on his opening statement and the ranking member, and I will, along with others, I think, listen to the testimony and try as best I can to come down in a nonsensitive way as I can to make a judgment here to support this legislation.

I think Senator Packwood was absolutely correct when he said that there is an avenue of correction. And if that is not done, then Congress in its wisdom will make some judgment. But if it is not right, and we attempt to amend it, it usually does not make it any better. But nevertheless, I think we have an opportunity, and if that opportunity presents itself in the proper manner and we make as good a judgment as we possibly can, then we have done the best job we know how in order to make it fair.

I am a little bit reluctant to move too far, since I will be one of those personally involved next year, as Senator Packwood will be. So it gives the appearance of selfish about your own campaign. But nevertheless, I am here. My judgment will be exercised, and I will do the best I can, and I compliment both of you on what I think is an excellent start.

The CHAIRMAN. Thank you, Senator Ford.

I have a statement from Senator Kassebaum, she plans on being here later.

[The statement follows:]

OPENING STATEMENT BY SENATOR NANCY KASSEBAUM

Mr. Chairman, I am a cosponsor of this legislation, and I commend Senator Danforth for offering the proposal. It is time for the Senate to address the problems associated with modern election campaigns.

This hearing and the next will provide us with the opportunity to explore the dangers of current trends and alternative solutions. We must commit our best efforts to developing campaign guidelines which offer the American people all the benefits of free expression and encourage substantive and credible debate on issues of the day.

Elections have become too expensive, too negative, and too far removed from a true debate between candidates and the electorate. The amounts of money required to run for public office are outrageous. Independent political action committees exert an inordinate and unhealthy influence on the tone of elections. Most often, that tone is one of oversimplification, cynicism, and negativism. Finally, we have far too little of the type of candidate-to-candidate debate which characterized even the recent past. Hype and headlines have replaced candor and communication.

Television and other electronic media have changed dramatically the method of running campaigns. With enough money and media consultants, we are now able to avoid almost altogether discussing a candidate's merits or the issues. This is not the democratic system our Founding Fathers envisioned.

The proposal providing the basis for today's hearing, S. 1310, is an attempt to recognize the breadth of the problem and offer a method for moderating the excesses of the current system. I am an original cosponsor of this legislation. My cosponsorship is not based on my belief that S. 1310 is the only solution to the problems of campaigning for federal office. However, this proposal is a thoughtful step toward a reasoned debate on election reforms.

Mr. Chairman, I hope my colleagues will study this issue. I know many are frustrated with existing campaign laws. The American people are similarly frustrated. This proposal provides a vehicle for discussing needed reforms, and I look forward to reviewing the testimony of today's distinguished witnesses.

The **CHAIRMAN**. Senator Howard Baker, our former majority leader, has been invited to testify. He had to cancel his personal appearance here today, but he has submitted a statement that I will read for the record.

STATEMENT OF HOWARD H. BAKER, JR.

Mr. Chairman, Members of the Committee, one of the great responsibilities of elected officials in America and of all other citizens as well is to make sure that this exquisite system of representative government is fully responsive to the clearly stated and effectively declared desires and demands of the people of this country.

I have great confidence in the political system and in politicians who, by and large, are the hardest-working people I have ever known and who demonstrate almost every day their extraordinary dedication and range of abilities.

I believe the American political system is in good shape. Certainly it has worked and is working better than any other system that I know of. But it is not perfect. And the fact that we are not satisfied with it and that we need to adjust it from time to time to improve it when improvement is needed, is a testimony to the continuing diligence of the American people and a reaffirmation of their respect for our great institutions of political government.

Fair play has been the guiding principle of our democratic government since the beginning. Indeed, it is the very essence of the Constitution. And fair play should continue to be the guiding principle in our public affairs. Yet, fair play is not always practiced in politics, as we know. There is one singular new development in American politics that violates fair play, and that is negative advertising, the paid commercial, usually on TV or radio that is a sneak attack on a decent person.

Not only is the negative ad the sleaziest new element in politics, it may also be the most dangerous. The first victim is the person under attack. But the greater victim is the integrity and credibility of the political system itself.

For the most part, these ads are inspired and created not by practicing politicians, but by professional advertisers, media experts, pollsters, producers of television and radio commercials. Most of the things you see and hear on these commercials are dishonest and downright mean and dirty.

We have all seen them, the cartoon, the simplistic image, the professional announcer who sounds like a movieland Moses condemning someone for votes on Social Security or school prayer or the debt ceiling or any other public issue.

I believe that if a candidate for public office has something bad to say about his opponent, he should say it himself on the platform, on radio, on television, or wherever. He should have the courage to stand up and make the criticism himself and let the voters decide which of the two is to be believed.

No candidate for public office should be permitted to hide behind the paid political announcer as if he had nothing to do with the commercial. The problem goes beyond elections, to the process of governing. Time after time when I was leader in the Senate and was trying to round up votes on a controversial issue, I would have senators say to me, "Howard. I would like to vote with you, but they would kill me with negative ads the next time I run."

I am confident that members of this committee and of Congress will find the most effective constitutional way to prevent political candidates from hiding behind negative commercial ads. The principle is a sound one. I supported it when I was in the Senate and I support it now.

[The bill follows:]

99TH CONGRESS
1ST SESSION

S. 1310

To amend the Communications Act of 1934 regarding the broadcasting of certain material regarding candidates for Federal elective office, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 17 (legislative day, JUNE 3), 1985

Mr. DANFORTH (for himself, Mr. HOLLINGS, Mr. SIMON, Mr. DIXON, Mr. GOLDWATER, Mr. PRESSLER, Mrs. KASSEBAUM, and Mr. HATFIELD) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

---

A BILL

To amend the Communications Act of 1934 regarding the broadcasting of certain material regarding candidates for Federal elective office, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Clean Campaign Act of 1985".

SEC. 2. (a) Section 315 of the Communications Act of 1934 (47 U.S.C. 315) is amended—

(1) by redesignating subsections (b), (c), and (d) as subsections (d), (e), and (f), respectively; and

(2) by inserting immediately after subsection (a) the following:

"(b)(1) If any legally qualified candidate for any Federal elective office (or an authorized committee of any such candidate) who uses rights of access and conditions of access under the provisions of this Act utilizes a broadcasting station to refer, directly or indirectly, to another legally qualified candidate for that office, such reference shall be made in person by such legally qualified candidate.

"(2) If the licensee of a broadcasting station permits such station to be utilized in a manner not in accordance with the provisions of paragraph (1) of this subsection, such licensee shall provide, within a reasonable period of time, to the candidate to whom reference was made the opportunity to utilize, without charge, the same amount of time on such broadcasting station, during the same period of the day, as was utilized by the legally qualified candidate (or by an authorized committee of such legally qualified candidate).

"(c)(1) If any licensee permits a person to utilize a broadcasting station to broadcast material which either endorses a legally qualified candidate for any Federal elective office or opposes a legally qualified candidate for that office, such licensee shall, within a reasonable period of time, provide to any legally qualified candidate opposing the candidate endorsed (or to an authorized committee of such legally qualified candidate), or to any legally qualified candidate who was so opposed (or to an authorized committee of such legally qualified candidate), the opportunity to utilize, without charge, the same amount of time on such broadcasting station, during the same period of the day, as was utilized by such person.

"(2) For purposes of this subsection, the term 'person' includes an individual, partnership, committee, association, corporation, or any other organization or group of persons, but such term does not include a legally qualified candidate for any Federal elective office or an authorized committee of any such candidate.".

(b) Section 315(a) of the Communications Act of 1934 (47 U.S.C. 315(a)) is amended by striking "section" and inserting in lieu thereof "subsection".

(c) Section 315(e) of the Communications Act of 1934, as so redesignated by subsection (a) of this section, is amended to read as follows:

"(e) For purposes of this section—

"(1) the term 'authorized committee' means, with respect to any candidate for nomination for election, or election, to any Federal elective office, any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding

$1,000 and which is authorized by such candidate to accept contributions or make expenditures on behalh of such candidate to further the nomination or election of such candidate;

"(2) the term 'broadcasting station' includes a community antenna television system; and

"(3) the term 'licensee' and 'station licensee' when used with respect to a community antenna system mean the operator of such system.".

SEC. 3. If any provision of this Act or the application of it to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by such invalidation.

The CHAIRMAN. The first witness today is Mr. Curtis B. Gans, director of the Committee for the Study of the American Electorate.

STATEMENT OF CURTIS B. GANS, DIRECTOR, COMMITTEE FOR THE STUDY OF THE AMERICAN ELECTORATE

Mr. GANS. I did not know I had to wade through a minefield in order to be able to testify.

I wanted to thank the chairman very much for inviting me, but much more so, I wanted to thank the chairman and the ranking minority member for sponsoring this bill in order to bring to bear this issue of political advertising and to round up as much support as they have to bring this issue to public attention.

As the chairman knows, I have been working with Senator Inouye and Senator Rudman on a slightly different version of this legislation, but I view these efforts as complementary, supportive, and I think this hearing and the series of hearings that you are going to be holding in making a legislative record and coming out with a series of legislative findings are probably as important a contribution to the democratic process as can be made.

I have a small group of ads to show this committee and those at this hearing. I would like to make four or five comments about those ads. First, I am an amateur taper, and the quality of the ads may not be professional quality, but I hope they will connote the message.

Second, I want people to be aware that each one of these ads is viewed by a captive audience. You watch these ads in the middle of programs. You have to make a conscious effort to turn off the set.

Third, I think people should watch these ads with the understanding that we are the only democracy in the world that does not regulate in some manner or form political advertising on television. And there is a study in my written testimony to that effect.

And finally, in watching these ads, I think you should look at whether these ads appeal to people's intellects or people's emotions and whether they promote or distort rational debate.

[A tape is shown.]

Mr. Gans. I think it should be noted that this tape is not an unrepresentative sampling. There are ads that are more demagogic than this; there are ads that are less demagogic than this. It also should be noted that six of those nine ads were not done by independent campaigns, but by campaign committees.

I have viewed literally thousands of ads. I have seen many exotic places that people on the public payroll are supposed to have wasted the taxpayers' money going to. I have seen dozens of weather vanes and flipping placards portraying candidates' faces to show how they have changed their positions. I have seen a lot of phones showing whether somebody is competent to serve in the highest office in the land.

I have seen a lot of voice-overs, anonymous voices claiming that leaders in their States have not done what they are supposed to have done in office. And what you had in all of these are propositions that are essentially undebatable because they reach through this medium into people's emotions.

Barry Goldwater can stand up and say: "I am not a member and never have been of the Ku Klux Klan," and that sounds lame. Barry Goldwater can stand up and say: "I don't want to kill little children eating ice cream cones," and that sounds lame. Or he could say: "that's a distortion," and that sounds lame.

As people may remember the defense, "I am not a crook," did not work very well. So what do they do? What they do is resort to equally demagogic negative commercials to fight the opposition. And what we have is the newest form of air pollution. What we have in a larger sense is what I would call a mockery of the essentially correct Supreme Court principle that the way to answer debate is with more debate, because what we are answering is not debate with more debate but distortion with distortion, and emotion with more emotion.

And what we need to do and what Senator Danforth's bill and others would do is restore some debate and civility into the American political process. And we need to do it not simply in and of itself, but because these things have serious other side effects.

One of those side effects falls into the bailiwick of my committee. For the last 20 years, by and large, voter participation in the United States has been declining. Twenty million people who used to vote have ceased voting. It has come at a time when we have made it, by and large, easier for people to vote, and it has also come at a time—and not surprisingly—coincident with the advent of television as a central force in American life and as a central medium of political communication.

What television does is make people spectators and consumers rather than participants. In politics, television occupies 50 to 90 percent of the campaign budgets and where television is relevant, denigrates all other forms of participation. And that type of ad turns people off from the entirety of the political enterprise, about which there is beginning to be some survey data. I included one reference in my testimony to a survey taken by the Public Agenda Foundation on campaign finance.

At the same time, what this does is substantially increase campaign costs. Campaign costs in constant dollars have tripled since 1960, doubled since 1972, while media costs have increased fivefold.

We did a study of the five most expensive Senate campaigns since 1974. The average costs in those campaigns has gone up from $1 million in 1974 to nearly $10 million in 1984. Translated, that is 67 cents a vote to $7.74 a vote.

The media costs in those campaigns have gone up from 12 cents a vote to $3.50 a vote. Our costs are increasing in expensive campaigns 10 times, and the media costs are increasing 30 times.

It has also robbed this polity of a sense of accountability. You go to conferences about campaigns and you hear the media advisers talk. You don't hear the candidates. What you have right now is a competition between media advisers. The candidates are outside of that competition. There is no discussion. There is a discussion of the ads, but there is no discussion of the issues.

You have, in addition, a weakening of institutions. What happens right now is, in order to run the modern-day campaign, what somebody needs is money and a media adviser, and he is no longer dependent on the party either for his election or for his disciplining in terms of program in office.

And of course you have the distortion of the debate.

And I think Senator Packwood is quite correct. This type of ad accentuates the effect of independent expenditure groups. I think independent expenditure groups have a right in the political process, but I don't think they have a right to dominate the political process by setting the terms of the debate by the most demagogic forms of television advertising.

Finally, I think we also have to look at the question of unnecessary turnover in public office. Our country depends on both continuity and change. When there are great issues before the public—Vietnam, Watergate—you don't need these types of advertising to emphasize the problems. People will turn people out of office.

On the other hand, by creating, as Senator Danforth correctly said, an issue by just photographing a chair with a name, you are putting in jeopardy careers and noble and decent public service that should not happen and would not happen if indeed the polity was in a debate format.

And so for all these reasons, I don't care what version comes forth, we need a Clean Air Act of 1985.

Thank you.

The CHAIRMAN. Mr. Gans, thank you very much.

Most of the commercials that you showed us were attacks by challengers against incumbent Senators, and the challengers lost. I suppose that there could be two conclusions from that. One conclusion would be that we sitting up here are incumbent Senators and we are trying to protect ourselves, and that is the reason for the proposed legislation.

Do you think that we should pull off of this concept because of that? Is this really a self-protection effort on our part? Or is there a deeper concern?

And my second conclusion is, could it be said that because most of those campaigns ended up in defeat for the challenger, that negative advertising does not work, and that there is a backlash effect against it, and that therefore the system is self-policing?

Mr. GANS. Well, in the first place, I was under some strictures by your staff not to put forward any scurrilous ads done by your colleagues. In other words, I could have inserted a whole series of ads by successful people. These would show that the system is not self-policing.

The question, obviously, is how skillful and how sophisticated the media adviser is; for example, the Johnson ads against Senator Goldwater were unsuccessful. People bring up the little girl with the daisies, but those two ads are far worse in terms of demagoguery and they were perfectly successful and nobody took them off the air. They took off the little girl with the daisy ad, but they did not take those ads off the air.

So I don't think it is self-regulating. I don't think in my discussions with campaign consultants, that there is any motivation amongst them to police themselves.

I was at an American Bar Association committee meeting in which Jill Buckley said, "we put forward scurrilous ads because they work, and I am probably as guilty as anybody else. Our job is to win elections." So I don't see that type of self-policing going on. What happens is essentially that people turn off the whole enterprise.

The CHAIRMAN. And you are confident, on the basis of your years of study, that voter participation has declined as a result of negative advertising?

Mr. GANS. I am confident that that is part of the picture. I mean I will not say that 20 million voters dropping out of the political process since 1960 are all attributable to television advertising or election night projections or any one of a number of other issues.

But I think this is a contributing factor, and there is beginning to be a body of data that helps put forth that proposition.

The CHAIRMAN. The commercial you showed attacking Senator Percy, the chameleon commercial, that was not run by Senator Simon or his campaign, was it?

Mr. GANS. No.

The CHAIRMAN. But what was that commercial? Who ran that commercial? And during what period of time was it run?

Mr. GANS. It was part of the $1,600,000 package that the gentleman, whose name escapes me, from California—Bob Goland, I think it is.

The CHAIRMAN. He was an interloper; right?

Mr. GANS. Right. He was an interloper.

The CHAIRMAN. And he came in late in the campaign and he ran those ads?

Mr. GANS. That is correct.

The CHAIRMAN. Senator Hollings?

Senator HOLLINGS. A general question, Mr. Gans. Now, you and I have identified the problem. We both agree. What is good about the bill that we have in and what is bad about the bill from your experience? You have been working in this for 10 years; you have looked at our bill.

What misgivings might you have about the bill in particular?

Mr. GANS. Can I treat it a slightly different way?

Senator HOLLINGS. Surely. I am groping for some kind of solution.

Mr. GANS. There are at three formulations. I put a different formulation in the legislation that is being sponsored by Senator Rudman and Inouye. That legislation essentially requires ads essentially under 5 minutes of length that the purchaser of the ad or an identified designee speak to the camera for the duration of the ad.

Why I think that is slightly preferable is that it does not deal with the content of the ad and may indeed rise to a Supreme Court defense, be more easily defensible. It essentially says anybody can buy whatever time they want, to say whatever they want, provided they live within a format.

Senator HOLLINGS. Format would require the individual to speak in the ad? Is that what you are saying?

Mr. GANS. Right. For the duration of the ad.

I also listed in my testimony two other modes, one of which is just simply eliminate the most egregious forms of this advertisement, the 30-second and 1-minute spot, and require all ads to be longer. Or, fourth, like indeed Britain does and other countries do, to not permit paid ads and to allocate a certain amount of free time to be distributed amongst candidates.

All of these approaches have problems. All of these will depend on sets of findings in hearings, arriving at which is the best, I hope, and reasonably soon. I don't want to be in a position in this hearing of suggesting that this one is better than the other one. I have reasons why I like the one that I am doing, but I don't want to be in a position of saying negative things about somebody else's, because I prefer doing something, rather than nothing.

Senator HOLLINGS. Well, the campaign is an adversary process, so we are going to be negative. You and I are running against each other. I am sure not going to praise you, and you are not going to praise me.

And when you get into speaking for the duration of the particular ad, that is mandating the content. What about the very end where we have now, if you want to benefit from the lowest unit rate—and that is the premise of this particular bill—you can still have negative campaigning and pay the full amount. But if you want to come under the Danforth-Hollings bill and the lowest unit rate, then you must comply with these particular requirements in this measure.

What about a proviso, instead of just paid for by Citizens Committee for Hollings, just say candidate Hollings approves this advertisement, or advertisement approved by candidate Hollings?

I am trying to get it couched in as few words, with a picture of the particular candidate. In other words, if you had that kind of requirement and identification, from your experience, Mr. Gans, how much would that limit the negative campaigning?

Senator Danforth and I have gone back and forth on this. He is rather open to my eyes. I have talked to experts. They think it would be a tremendous limitation on negative campaigning in the sense that a legitimate candidate did not want to be identified with that negative approach.

But from your experience, what would your answer be if I just required in the bill something like just say advertisement approved by candidate Hollings, and have my picture there, just a flash, just like they do right now—if I had that on every one of those ads, would that diminish in some measure, negative campaigning?

Mr. GANS. My judgment—and we have a condition contrary to fact—is that it probably would not.

Senator HOLLINGS. It would not?

Mr. GANS. No. People put forward this type of message because the stakes are high enough for them to put forward that, and they are willing to take that risk.

I understand what you are saying and I think what would happen is that essentially everyone would likely fall in and everyone would continue to do what they have been doing.

Senator HOLLINGS. Well, let me add, Senator Packwood made the observation about none of the broadcast media being required to air PAC advertisements, but yet the PAC's pay the top rate. They don't get the lowest unit rate. And if I am running a TV station, I am in business, and I am not pro bono publico. I am trying to make a profit for the TV station. So that is welcome.

When these candidates come around, I have to sort of give away my time, but if I can get a PAC, I am getting full rate. The more the merrier, let them pour it on, and maybe that will make other PAC's come in, and whoopee, I am in business and making a greater profit.

But I am saying, if you want that lower unit rate and you want that identification before they can run that negative kind of advertisement, you have got to have it approved by the candidate, approved by candidate Hollings.

Mr. GANS. And all I am saying is, I think it would be a useful step, but I don't think it would change the phenomenon. I think it would be a useful step in terms of accountability to place the blame for a particular ad, but if I had to argue the issue as to whether it would be effective in Senators campaigning through television the answer is no.

Senator HOLLINGS. It would not change the ad.

Mr. GANS. I am saying I don't think it would change the tendency to do that type of ad.

Senator HOLLINGS. You really believe that? You know good and well that on that chameleon ad, if that fellow, in order to get the political rate, had had to go to Senator Simon and have approved by Senator Simon, Senator Simon would not have ever approved that.

Mr. GANS. Are you talking about strictly independent expenditure ads?

Senator HOLLINGS. Right. I am talking about all political advertising if it is going to be critical. Let's not even use the word "negative," because we can debate that from now on, what is negative and what is positive. But anything with respect to the particular advertisement in that campaign that criticizes a record has to have approved by candidate Packwood, or approved by candidate Hollings.

If I had that in there, I would not allow it to be run, and Simon would not have allowed it to have been run.

Mr. GANS. But six of those ads were run with the candidates—theoretically, with the candidates' approval because they were——

Senator HOLLINGS. Because you and I did not know it was being run with their approval. You are saying that is a fact, but we did not know it by looking at it.

Mr. GANS. I think you have two problems with that approach, one of which is I am not sure because of *Buckley* v. *Valeo*—and Newt Minow could speak to this because I am not a lawyer—is such that independent expenditures are supposed to be independent, and they are right that speech is supposed to be protected, and therefore I think you would be running against the court in terms of having to have the candidates 'approval before their ad could be on.

I don't know that.

Senator HOLLINGS. Just approve it in order to get that particular rate. They could run it anytime they wanted to, at a higher rate.

Mr. GANS. They could run it at the higher rate.

Senator HOLLINGS. But if they wanted the lower unit rate, then that diminishes it.

Mr. GANS. What I am saying is, I would support that provision. How effective that would be in terms of mitigating our air pollution is not likely to be that great. That is all I am saying.

I would support that provision. I think it would be helpful.

Senator HOLLINGS. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Packwood.

Senator PACKWOOD. Mr. Gans, is the quality of government that we get increased if we have, on the average, larger voter turnouts and decreased with smaller voter turnouts?

Mr. GANS. Can I turn that slightly around so I don't have to answer that quite in that way? I think there are four specific risks with lower voter turnout. One is the risk that when you have lower voter turnout—since voting is the lowest common denominator act, and people who don't vote tend not to participate in anything else—you increase and enhance the power or organized special interest, people who are intensely involved.

Second, I think that does end up to have an effect on public policy. My favorite example is public employees who constitute one-sixth of the eligible voting force. They vote very heavily. When half the rest of the electorate votes, that one-sixth becomes one-third. When only about one-third of the rest of the electorate votes, as in our congressional elections, one-sixth becomes one-half or close to it.

And we are then in the situation of you want to abolish agencies, you want to engage in civil service reform, you want to do a whole series of things, it becomes that much more difficult because they are a really important voting block.

Third, because voting is the lowest common denomination act and lower voter participation is indicative of lower involvement, the very spirit of volunteerism and involvement upon which our country depends does erode. And finally, because nonvoters tend to be less interested in politics, less focused on the concerns of our society, the more chance we have for demagoguery to take hold and to be effective.

And so in those four ways, specific ways, I think the good government is hurt by lower involvement.

Senator **Packwood**. That is a good answer The theory of diffusion. If 90 percent of the people vote, a 5-percent single interest group is not as significant as when 50 percent of the people vote. In my experience in politics, obviously more related to Oregon than elsewhere, I find more people involved. Most of them vote; some of them do not. But they serve on school boards, zoning commissions, racing commissions, all of which are unpaid jobs in Oregon. We have no shortage of citizens willing to participate in government.

And somehow I have misgivings about get-out-the-vote drives for the pure sake of getting out the vote. Skip that. Today's topic really is more negative advertising than it is large voter turnouts or small voter turnouts.

I will make you this bet. Within a decade, the kind of negative advertising that we are seeing on television will shift much more heavily to direct mail. When the cross-fertilization of the Florida system of polling and census tracking data and mailing lists that you can rent are all put together, and you can target 1,500, 2,000 people, all zealots on a particular cause, not only do you then not have to expose yourself to the approbrium of others who will never see your scurrilous mail, you probably can actually make the mail pay for itself.

Then what are we going to do?

Mr. **Gans**. Let me deal with, in one sentence, with the first half of your question, which is, whereas I don't believe in mindless get-out-the-vote campaigns, I do believe that it would be useful to provide in various ways the motivation for more people to participate.

And that is a different question.

The second question is on direct mail. When I have been dealing with this issue of televised advertising, the answer is if you reduce cost by cutting down at the point of greatest hemorrhage—TV, aren't you going to enhance the tendency to direct mail?

Now, I am a former campaign manager, too. I was staff director of Eugene McCarthy's 1968 Presidential campaign, and I have done a number of other campaigns. And as a campaign manager, unlike television, which I can find unlimited utility for, if I am going to be defending my candidate against direct mail, what I am going to do is stuff the mailboxes. I am going to have so much direct mail that that person is not going to read anything.

And I think that is what is going to happen. I also think that what is happening right now—because every direct mail outfit I know is reporting reduced revenues. So I don't agree with that conclusion. I do agree that the motivation of anonymity and specific targeting is a valid motivation to moving to direct mail. But I think the utility of direct mail will prove less and, unlike this technique (TV), it is eminently defensible by other campaign tactics. This one is not.

Senator **Packwood**. We are not there on direct mail yet. Your experience in 1968, and mine to date, isn't where we are going to be. But we will be able to zero down to the owners of Irish setters--I don't know how many that may be in Oregon—and you will be able to do a mailing to the owners of Irish setters, talking about whatever you think their favorite issue may be and that mailing will pay for itself, and they are not going to be deluged with hundreds of letters coming in. If in that mail you talk about how absolutely mean and criminal your opponent is in the treatment of Irish setters, that is infinitely more effective than a shotgun television ad, which has to irritate a fair number of people in addition to influencing a fair number of people.

Mr. **Gans**. First, I don't think there is any data to support that the direct mail is more influential than TV. In fact, what data we have right now is TV is the primary medium for affecting people's views to the extent that they are affected and not simply reinforced. Part of it is simple reinforcement.

The second thing is, it may be that you may run the campaign and send the mail to the Irish setter, but if I am the campaign manager for the opposition, I will guarantee you I am going to spend money to flood the mailboxes so there is enough there that one particular appeal is not going to be what you are going to pick out.

You are going to probably throw the whole mess into the wastebasket, because that is my way of defending against direct mail.

Senator **Packwood**. Thank you, Mr. Chairman.

The **Chairman**. Senator Exon.

Senator **Exon**. Again, thanks for coming. It is a very important matter, and I know you have done a lot of study on this and we are delighted that you are here this morning. I just have one question.

I took it from the responses to the questions posed by my colleague, Senator Hollings, that with regard to the Clean Campaign Act of 1985 you feel it might be somewhat helpful, but you do not believe it would have a significant impact on the desire of cleaning up the campaigns.

Is that a fair way to state it?

Mr. **Gans**. No, that is not. I think it would have a very significant impact. Even though I think that there are slight problems with it, I think it would have a very significant impact.

If I think that there are other approaches that are slightly preferable and——

Senator **Exon**. That was the next part of my question.

I understand that you had been supporting some kind of a bill that I believe is tied up in the Rules Committee at the present time; is that correct?

Mr. **Gans**. It was introduced last year. It has not yet been reintroduced this year. But yes. I have been——

Senator **Exon**. Just to give me a perspective on that and how this might possibly be improved, could you cite the key parts of that bill? Do you think that bill would be more effective than the Clean Campaign Act of 1985 to get to the problems that we are trying to address?

Mr. **Gans**. I think it would be slightly more effective, stand a slightly better chance of constitutional defense, and does not provide the option for somebody to deliberately violate the terms of Senator Danforth's bill and risk the opponent's grant of equal time.

Senator **Exon**. All right. Let me get down to specifics if I might this way. If you were to suggest additional amendments to the Clean Campaign Act of 1985 that would strengthen it to accomplish the desired goal, what specific amendments would you suggest?

Mr. **Gans**. I really don't want to get into that issue. The Clean Campaign Act of 1985, I think, is a very very thoughtful approach that fits within the realm of the Commerce Committee and the Federal Communications Act. The nature of the legislation that I proposed fit within the realm of the Rules and Administration Committee as a restriction on the candidate and its enforcement mechanism was injunctive relief and the penalities under the Federal Election Act.

Senator **Exon**. Then if I understand what you are saying——

Mr. **Gans**. I don't want to suggest that that is simply a jurisdictional question. I spent about 3 years going around figuring out what method would engender the least organized opposition; what method had the best constitutional shot of being defended; and what method would address all aspects of the problem without loopholes for violation.

That legislation is included in my testimony.[1] I happen to think that is the best approach. I don't think that is the only approach. If the Senate in its wisdom went to Senator Danforth's bill, I am cheering. If they went to getting rid of the 30-second and 60-second commercials, I am cheering. If they went to the British system of allocation of time, I am cheering.

But I do think that we need coercive action, and I think Senator Danforth's instinct in this is absolutely correct.

Senator **Exon**. So to make the record clear, you are in support of the Clean Campaign Act of 1985, and are not suggesting any amendments thereto?

Are you a lawyer, Mr. Gans?

Mr. **Gans**. I am not a lawyer.

Senator **Hollings**. I thought you were the lawyer.

Senator **Exon**. I am not a lawyer either.

Mr. **Gans**. I am not a lawyer and the answer is, for the purposes of this hearing, that prior to a legislative hearing on this legislation or any markup, I would be glad to submit any thoughts I had on specific amendments to this legislation.

I would rather not, since I was invited at this hearing to deal with the general issue, and to raise various solutions, I would rather not try to deal in any particular way with the details of this legislation.

I want to say I am a supporter in concept and I want to hold my fire on the details, OK?

Senator **Exon**. Mr. Gans, my time is up. I just want to say that we consider you an expert in this area so any suggestions that you care to make in regard to improving this bill or making it better, at least as one member of the committee, I would like to have them.

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[1] See bill S. 2509, 98th Congress.

Mr. **Gans**. Thank you. I will be glad to help.

The **Chairman**. Senator Goldwater?

Senator **Goldwater**. Thank you, Mr. Chairman. I'm sorry I wasn't here for your entire presentation, but I have read enough of it to know that I am in agreement with you.

I am not certain, even though I am a cosponsor of this bill, that this bill is going to do everything that we want in this field. As you know, I have had long experience in campaigning, and this dirty advertising has become a business, a rather major business.

If you want to run for any office today, and you know who your opponent is a year or a year and a half ahead of time, all you have to do is look up one of these dirty firms, tell them what you are running for, give them an idea or two, and let them tie the dirty dog on your opponent. And they can do it.

So I am not certain that the legislation is going to prevent that problem. I have to say, Mr. Chairman, to me, the whole subject of television advertising has degraded terribly. I spent millions of dollars advertising when I was in business myself. I would never have thought of downgrading my opposition.

Today, you cannot look at a television ad that does not say, buy my car; that car stinks. Or another thing, when I was brought up in athletics, alcohol and athletics were not associated, even though we imbibed. Today, you cannot watch a football game, basketball game, or any kind of game without seeing the insinuation that the boys drink beer in between halves or when they are sitting on the bench.

So the whole subject of advertising on television has gotten bad. I don't know how we can change it. I wish we could, but I think under our constitutional right of free speech, you can pretty much do as you want.

I have nothing more to say on this, Mr. Chairman. I have lived through this kind of thing. It is the most disgusting development in politics and in general business that I have lived through in my life.

I know one successful candidate—this will show you just a little trick of the trade—who had a terrible-looking head of hair. And after one television show, I said, god, your hair looked good. How did you accomplish it, because it looks like hell most of the time?

Oh, he said, we just sprinkled gold dust in it. Now, those are little tricks, like you have to have a hairdresser to fluff up your hair, makeup artist to make you look young. Some people even get their faces lifted. Frankly, I am glad I am getting out of the damn business.

Mr. **Gans**. Actually, we are sorry you are getting out of it.

Senator **Goldwater**. Well, I thank you, Mr. Chairman, and I appreciate your testimony. I did not want to take up that time, but I am getting sick of looking at the stuff that I have to watch on television.

The **Chairman**. Clearly spoken.

Senator Pressler?

Senator **Pressler**. Well, following up on those eloquent remarks, I guess the real problem here is that the public and press and our institutions really have to respond to positive advertising, whether it is in politics or business or anything else, because whatever kind of law we would write, wouldn't there be a way of getting around it?

Citing the negatives of the opposition appears to succeed in selling hamburgers and appears to succeed in selling other products—we seem to be in an era of negative advertising, not just in politics, but elsewhere. And apparently, the public responds to it, and the press does, too.

I know that negative ads that have been used against me immediately make the newspapers as sort of news. And positive ones do not. So it seems that there is a broader question here, and maybe it is one that cannot be legislated. Even with legislation, there are always ways of getting around it, always ways of doing it differently.

So how do we get the press and the public to respond to the candidate who runs clean, positive ads?

Mr. GANS. That is a tall order. I think the first thing that needs to be said is I think you can write legislation, including this legislation and the one that I suggested in my testimony, that would be relatively hard to get around. And I think it is important to legislate. I think it is not an industry that is going to regulate itself.

I tend to make an analogy between conventional weapons and nuclear weapons, and television and all other forms of communications. That megaphone reaching people's emotions in the way it does, with as many people as it reaches, is a whole other experience in our lives. And it might be nice to regulate conventional weapons, but we need to regulate nuclear weapons, and I think we need to regulate television, whether or not—and I think not—we need to regulate anything else.

I think the press is going to respond to what are the issues that are generated in the campaign and they are not going to do anything different. And I think it is the job of Government right now to deal with the pernicious effects of this technology to regulate the campaigns, because that is the only way that we can begin to get issues and debates on that tube rather than demagoguery.

Senator PRESSLER. In your testimony you said that our voter turnout had gone down substantially or was not increasing compared to other countries. But don't a lot of other countries have some incentive or law, like getting your poll tax waived, or something of that sort?

Mr. GANS. Most of the other countries do not. There are some countries—Australia has a form of mandatory voting. Italy, in theory, does. There are countries with that. But if you are talking about all the democracies, most of them do not.

Senator PRESSLER. What about those that have a higher turnout than we do?

Mr. GANS. All of them have higher turnouts than we do, with the exception of Switzerland and India, which are at our low level. And most of those which have higher turnout than we do, do not have any such requirements.

Senator PRESSLER. They don't have any mechanical thing, any incentive?

Mr. **Gans**. The only mechanical thing that they have different is that in most of those countries the voting list is prepared by the State rather than requiring the individual citizen to both register and vote.

On the other hand, whatever studies have been done in this country indicate that if we got rid of all the registration requirements in this country and adopted a system in Canada—universal enrollment where they go out and canvass everybody and prepare a list, and all the person has to do is show up to vote—a system I would favor, we would increase our voter turncut by 9.1 percent and still be below where we were in 1960 and below all but three democracies in the world.

Senator **Pressler**. But the point I am making is, in countries that have an identification card or something similar, you could get that renewed and be sure your address is right, and accomplish a number of things that you normally have to go to the courthouse for anyway.

Mr. **Gans**. That would help in this country. But that would not change the basic fact that our voter turnout would be still lower than all but three democracies in the world, even if we did that.

Senator **Pressler**. And you attribute that to apathy?

Mr. **Gans**. I attribute that to a variety of things. I will be glad to submit for this record an article about some of those considerations. It begins with families and schools. It is this instrument here. It is the quality of our political parties. It is the nature of the debate. It is the decline in leadership training institutions. It is the decline in a sense of national purpose. It is political consultants fragmenting our society. It is voting registration laws. It is a lot of things.

It is not a simple problem. And if we are going to address it, and I think we should address it, we should address it on various levels.

Senator **Pressler**. I am interested in learning more about groups working in this area and I applaud your testimony. I think you are doing a fine job.

I want to learn more about the Committee for the Study of the American Electorate. How do you raise your money? And could we have a printout of your contributors?

Mr. **Gans**. Surely. For the record, we raise most of our money from foundations, but we also have unions, corporations, and individuals, and they range the full spectrum. Senator Goldwater's former campaign consultant, F. Clifton White, is a member of my board, as are officials from the UAW, AFSCME, and others

The **Chairman**. Senator Ford?

Senator **Ford**. Mr. Chairman, I regret I was not here to see the ads. I understand they were rather good. You stated in your statement that the general public is tuning out and turning off. And basically you were referring to the negative ads.

I am not sure that you are in the real world with the political aspect of it as it relates to winners. I am not saying that you are not, but I have heard too many of both parties say that *x* candidate was behind until he began to run the negative ads against his opponent.

Maybe I was not here when you explained that. But those negative ads produced a come-from-behind winner in more than one case in the last election, and the previous election. So those who want to win, a significant approach would be negative if it is handled properly and the timing is right and so forth.

Mr. **Gans**. I state in my written testimony that the campaign consultants go to these negative ads, by their own statements, because they work, because they do produce winners, and they do; they show no signs of self-regulating themselves in that because their stake in the system is to produce winners, so that one of the reasons I am concerned is because they are effective. They can be effective in distorting results in a way that is not consonant with the sort of debate that you want to foster that would create a rational, or as close to a rational response as you can get from the citizenry about what is at stake.

Senator **Ford**. Well, I am reading your testimony. You talk about——

Mr. **Gans**. There are two different questions. If you read further in the testimony, you will find that I deal with the fact that people use negative ads because they work. I am also suggesting that the impact on the overall electorate is that they dislike this type of ad and are turned off by it, and that the whole political enterprise is seen in a negative light by virtue of this.

Senator **Ford**. You mentioned my colleague who was defeated last year, Senator Huddleston, and you said that a rational answer, demagoguery and distortion has always been with us, but television has created a new and dangerous and destructive playing field.

In observing Senator Huddleston's race, how should he have coped with so-called hound dogs?

Mr. **Gans**. Well, you see, I do not think you can.

Senator **Ford**. I think he could have. I think he could have early on.

Mr. **Gans**. Well, as far as I know, the first appearance of the hound dog commercial was 1 month before his——

Senator **Ford**. I think a little bit longer than that because you had two hound dog ads that were separate. The second one—I see some smiles out there, but the second one was more influential than the first one, but the hound dog ad itself did not win or lose the campaign. That started people to laughing and to thinking, and they looked at the more substantive ad as they related to the issues.

Mr. **Gans**. Well, I think they also looked at—I do not know. I do not have the survey data of Kentucky to know whether the attendance issue which was the issue around which the hound dog was a significant issue. I do have the tapes of the types of answers that Senator Huddleston put out. The first type of answer was an answer that essentially said this distorts my record. I was a 94 percent Senator, and so forth. The second was an attack ad on his opponent and on the way his opponent conducted the campaign.

Senator **Ford**. And each time he ran those, his opponent's percentage went down.

Mr. **Gans**. Right. But the question is which one was more effective, and we do not know opponent's percentage probably went up as a result of the first set of ads.

Senator **Ford**. Yes, it did, but not significantly in the tracking polls. I am privileged to those.

Mr. **Gans**. I am not privileged to that.

Senator **Ford**. The Huddleston negative ad, which he decided let's get out of this and start talking about the positive aspects, from then on the problems set in, and when you look at and analyze the race, that puts you back in the posture we do not want to be in.

Mr. **Gans**. That is exactly right.

Senator **Ford**. What if he had had an ad something like this that said—Senator Huddleston, everyone knew was a late worker, worked all night, read extensively, did his homework well on legislation, that sort of thing. What if he was sitting there at night with the light on and a knock came on the door, and so he would get up from his desk, from working on legislation the next day, Agriculture Committee or whatever, and open the door and say, well, you finally found me, at work. Come on in and I will give you something to eat.

Would that have blunted that some in your mind? Just think about it a minute. You do not do it with substance, you do not confront it with substance, you do it with the same attitude that they are trying to portray.

Mr. **Gans**. Absolutely, and occasionally somebody finds somebody like yourself who is clever enough to dream up an idea that works. Congressman McNulty was the subject of a series of ads that were attacking him, and he invented an ad to respond to the attacks which showed a Pinocchio figure with an increasingly longer nose, because of the lies that were in the attack, and that apparently had some effect. All I am saying is yes, if you have clever responses, you may be able to undercut the impact, but the danger continues to be that what you have is a polity by increasingly escalated, slick responses, initiatives, and responses, and somehow what this polity is all about gets lost.

Senator **Ford**. Well, just remember, old Doc Melcher knows.

Mr. **Gans**. Right.

The **Chairman**. Mr. Gans, thank you very much for excellent testimony, very forceful, very helpful to the committee.

Mr. **Gans**. Thank you very much for having me, and let's hope the Cardinals win tonight.

The **Chairman**. I am for that. Senator Exon is for that, too.

Senator **Ford**. Will Pete get his hit today? That is all I am interested in.

[The statement follows:]

Statement of Curtis B. Gans, Vice-President and Director, The Committee for the Study of the American Electorate

Mr. Chairman, my name is Curtis B. Gans. I am Vice-President and Executive Director of The Committee for the Study of the American Electorate, a non-partisan nonprofit, tax-exempt research corporation, looking into the causes and cures of low and declining voter participation in the United States of America.

I would like, at the outset, to thank the chariman of this committee for inviting me to appear, to his staff for their cooperation and assistance, and for the occasion of this hearing.

For there is no more important problem affecting American politics than the problem posed by televised political advertisements and the fact that both the chairman and ranking minority member of this committee have taken the lead in attempting to address this problem is gratifying to me and should be gratifying to this nation.

My understanding is that this hearing is the first in a series and that the focus of this hearing is to raise the broader concerns about the impact of political advertising on American politics. My testimony, both written and oral, with its accompanying materials both written and visual, is an attempt to outline the nature of the problems that modern day televised political advertising has created for the American political system.

As the chairman of this committee knows, I have been working with two of his distinguished colleagues, the Honorable Daniel Inouye and the Honorable Warren Rudman, on a slightly different approach to legislatively resolving this problem than that offered by the chairman, ranking minority member and others on this committee.

This testimony will include an outline of that approach and our views on the relative effectiveness of the different approaches.

But while I would be less than candid if I did not state that I believe our approach to be preferable, I view these efforts as parallel, supportive and complimentary. It should be said, at the outset, that it is only because of the intervention of this committee and its chairman that there is any likelihood that this problem will be satisfactorily addressed in the near future. And the work of this committee today in establishing a legislative record prior to a set of committee findings is indispensable to providing the basis for a Constitutional defense of legislating constructively in this area.

(To this end, I would also ask that the committee include in this hearing record certain supplementary materials which are referred to in this testimony.)[1]

The danger posed by televised political advertising, and especially in its present and most effective manifestations in demagogic and negative advertising, cannot be overstated. The danger, however, can be categorized:

A. TURNOUT AND TURNOFF

My Committee was established in 1976 to look into the problem of low and declining turnout in America. It is hardly a secret that the United States has the lowest voter turnout of any advanced democracy in the world, with the possible and occasional exceptions of Switzerland and India. It is also no secret that with the exception of the highly polarized elections of 1982 and 1984, voter turnout has been declining steadily since 1960, at precisely the time when we have engaged in major reforms to make it easier for people to vote. It is also no coincidence that voters have been tuning out and turning off during precisely the time when television has become a central element in American lives and television advertising has become a central tool in the conduct of modern political campaigns.

During the last two decades 20 million Americans have ceased voting, attitudes towards politics and political leaders have grown more cynical and political institutions ranging from precinct committee to national political parties have been atrophying.

Much of this should not be surprising, because the impact of television as an institution is to make of the American public spectators and consumers rather than active participants with a stake in the outcome of our politics.

In its application to politics, the impact of television has been more pernicious. For in those campaigns where television can be made into a relevant factor, televised advertising accounts for between 50 and 90 percent of the average campaign budget. Gone are those vestiges of citizen involvement. Whether it be buttons and bumper stickers, to storefronts and canvasses, popular involvement is gradually being eradicated from politics.

In its stead is increasingly demagogic use of commercial advertising on television. On the evidence of the consultants alone, they are producing more and more scurrilous ads because they are effective. But they are also effective in discouraging voters. In a survey taken by Daniel Yankelovich for the Public Agenda Foundation on the question of campaign advertising, those surveyed indicated that what they objected to was not how much was being spent on political campaigns, but how much was going into "air pollution"—the thirty-second and sixty-second negative ads. Similar testimony comes from hundreds who were interviewed during the late but unlamented North Carolina senatorial campaign. The public is, not by the elected official's performance in office, but by the nature of the campaign, getting a dim view of the political enterprise as a whole and the character of their public officials. They are tuning out, turning off and staying home. The question, "What if we held an election and nobody came?" may become more a rhetorical gimmick in the not too distant future.

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[1] The supplemental material has been retained in the Committee files.

B. COST

Nothing in the foregoing should suggest that the issue of cost is unimportant. In the two and a half decades since 1960 or roughly the time in which television has assumed the centrality it enjoys in American lives and in the conduct of campagins, costs of campaigns have been escalating.

A few facts graphically highlight this:

In 1960, the total campaign costs for all races in the United States was $175 million. In 1980, it was 1.2 billion.

In 1972, the average cost of a race for the U.S. House of Representatives was $39,942. In 1982, it was $158,000.

In 1972, the average cost for a Senatorial race was $368,656. In 1982, it was more than $1 million.

In constant dollars, the cost of campaigning has tripled since 1960, doubled since 1972.

We are rapidly approaching the time when only the rich or those with access to great individual or interest group wealth can afford to compete.

In a study which we are in the process of completing, my Committee looked at the five highest spending Senatorial campaigns for each even number year from 1974 through 1984. In those twelve years:

The average cost of these Senatorial races went from $1 million in 1974 to nearly $10 million in 1984.

The average cost per vote went from 67 cents in 1974 to $7.74 in 1984. (Sen. Jay Rockefeller alone spent $32 a vote in his campaign in 1984.)

The average media cost went from 12 cents a vote in 1974 to $3.46 in 1984.

There is little question that it is the use and cost of television advertising that is most responsible for driving the costs of campaigns up. In the period between 1952 (when television was first used in political campaigns) and 1972, according to FCC figures, the amount spent on political advertising increased five times, while overall campaign spending doubled. There is no comparable study for more recent years, but as can be seen from our limited study of the top-spending Senatorial campaigns, the average cost of the overall campaign increased by ten-fold, while the increase in media spending was nearly 35-fold.

This is true, in small part, to the fact that media outlets are now charging as much as sixty times what they charged in 1974 to air such ads. But in much larger measure, it is due to the increased use of these ads in political campaigns.

The problem created by excess cost in terms of access—access of those who cannot afford it to participate in the political process, access of those who bankroll campaigns to office-holders—will not be solved without squarely facing the issue of public financing of campaigns. But it can be mitigated by addressing the problem of increased costs at its point of hemmorhage—political advertising.

C. INSTITUTIONS

The rise of televised political advertising also coincides with the continuing decline of the central political institutions of the American polity, most notably the political party. This should not be surprising.

Once a candidate was nurtured by the party, trained by its leadership to leadership, dependent on local party organization for electoral success and beholden to the party once in office in such a way that made some discipline on principle and program possible. Now, a candidate seeks money and a media advisor and arrives in Washington, dependent only on polls and constituent service for his continuance in office.

This transcendance of party in favor of media consultants enhances the centripetal force of special interest, weakens the forces of popular mobilization, both within parties and among other organizations and lessens what little stability and cohesion exists in the American political system.

D. ACCOUNTABILITY

The increased dependence on televised advertising which enhances the influence of media consultants weakens the accountability of office holders and candidates.

A media consultant is by nature not accountable to the electorate. He makes his living and insures his future by winning elections for the clients he is hired by. He can and does use whatever techniques and strategems are likely to benefit his candidate whether those strategies and tactics are ethical or not.

By using techniques such as actors playing parts, demagogic scene settings, impersonal voice-overs, anonymous commentators, emotional music, etc., he can and increasingly frequently does establish the terms of debate in such a way that his client and principal escapes responsibility for what is conveyed and in terms that are unanswerable by the opposition, except by resorting to precisely the same techniques.

So what has developed in these United States is a competition, not between leaders, not between parties, not between principles and proposals, but between media advisors who compete with each other to see who can outslick the other to win. And the public has no one to hold accountable.

E. DISTORTION, DEMAGOGUERY AND NEGATIVISM

What this in turn has led to has been increasingly scurrilous campaigning. This, of course, is not a new phenomenon. Mudslinging has been with us for some time. Nor is it a new phenomenon on television as Senator Goldwater can testify to from his sad experience in 1964. But it appears that it has been elevated to a high art.

The campaign of 1980 was noted for the extreme, demagogic and negative commercials done by the National Conservative Political Action Committee (NCPAC). Subsequent campaigns in 1982 and 1984 have been noted by the degree to which these campaign excesses have been practiced, not by independent expenditure groups, but by the majority of political campaigns. As Jill Buckley, a political consultant, suggested at a recent seminar of the American Bar Association, "We do it because it works," admitting in the process that she had produced about as many scurrilous ads as any other consultant.

The problem of scurrilous ads on television is that they are not effectively answerable by rational debate. Senator Goldwater cannot correct the image that he is an irresponsible bomb thrower as he was portrayed by the famous ad of the little girl with the daisies. Speaker Thomas (Tip) O'Neill cannot correct the image of the fat buffoon the Republican National Committee portrayed him as (with the aid of an actor) last year. Sen. Walter Huddleston cannot correct the emotional effect of a trained bloodhound by rationally citing his 95 percent attendance record.

Demagoguery and distortion have always been with us, but television has created a new, dangerous and destructive playing field. In debate or in print, one can answer one's opposition on relatively equal terms. But it is precisely this sense of debate, of joining issues, of rational discourse that, I believe, the framers of the First Amendment had in mind which is being undermined by the images put forward in the modern-day political campaign.

F. INDEPENDENT CAMPAIGNS

Some years ago, the Supreme Court in *Buckley* v. *Valeo* ruled, I believe rightly, that organizations independent of party and candidate had a right to participate in the political dialogue. It did not, however, rule that these organizations had a right to dominate the dialogue. Yet, in 1980 and perhaps again sometime in the future because of the skill of their demagogic advertisements, one organization had the ability to dominate the political debate, at least in a number of states.

While not denying these independent organizations the right to participate in the debate, their participation should be in the nature of debate or it is possible that our polity will be dominated not by candidates and parties, but by fringe and splinter groups with the wherewithal to buy time and create demagogic commercials to the detriment of the national dialogue.

G. TURNOVER

Finally, it should be noted that our system depends both on continuity and orderly change. A person discharging his duties in office in a responsible manner should not be put out to pasture, unless or until his or her views on the major issues of the day differ from the constituency which elected him or her (or, of course, he or she engages in acts that tend to bring disgrace upon either his or her person or the office he or she holds.) When there were great issues confronting our society—Vietnam, Watergate, the state of the economy (as in 1982)—there was no difficulty bringing about changes, without resort to televised political advertising.

But the present state of affairs is that every officeholder, every career is subject to swift political termination, not by the quality of his or her work, but by the skill and demagoguery of a campaign consultant and the resulting political advertisements. Created images, distorted facts, demagogic film treatment can effectively wreck a lifetime of loyal, effective public service and with it the stability upon which American democracy depends.

The sad situation which we face is that talking cows have replaced talking candidates, demagoguery has replaced debate and that the political system has suffered in the process.

My Committee, a year ago, commissioned Austin Ranney and Howard Penniman to do a study of whether and how other democracies regulated television advertising during their political campaigns. That study, appended to this testimony found that every other democracy in the world has established some regulation over the use, timing and/or format of political televised advertising. All of these democracies either allocate free time, limit the amount which can be spent or the amount of total time for political advertising or apply restrictions as to the format of political advertising on television.

In view of the adverse effects of televised political advertising, the unlikelihood that there will be any self-regulation, the distortion of the Constitutional intent of free debate that these ads cause, the United States cannot and should not continue to be the only democracy in the world whose laws stand silent on this issue.

The chairman and ranking minority member of this committee have proposed legislation that would address the most egregious aspect of the televised advertising problem—the problem of demagogic negative ads. They are to be commended for this effort.

I have appended to this testimony a copy of legislation which was introduced last year by Senators Inouye and Rudman in the Senate and Representatives Barber Conable and Matt McHugh in the House (and a Constitutional defense prepared by the law firm of Kaye, Scholer, Fierman, Hays & Handler) which provides another approach to the problem which I believe would be both more far reaching and entail less problems in its Constitutional defense.

In its simplest terms, it provides that the purchaser of any advertisement of ten minutes duration or less intended to influence the outcome of an election (whether that purchaser be candidate, candidate committee, party or independent expenditure group)—that purchaser or an identified designee must appear before the camera, speaking to the camera for the duration of the advertisement. It permits some variation in backgrounds provided they are live and taken with the same lens as the speaker, mandates written material identifying the speaker and purchaser of the ad, and permits such written material as will identify the candidate if the speaker is not a candidate, the party of the speaker, whether it is an ad endorsing election for the first time or re-election, a solicitation of funds and such material as may aid the hearing impaired. It provides injunction relief to get ads which violate the standards in the legislation off the air, punitive relief in the form of civil penalties, and uses the structure of the Federal Election Commission and the U.S. Judiciary for enforcement. It is intended to restore debate by establishing a uniform and verbal format for all ads of a certain length.

We believe this approach is preferable because by establishing a uniform format, it does not directly deal with the content of the ad, by making the enforcement mechanism judicial, it does not invite the possibility of pre-publication censorship and by applying the standard uniformly to televised ads, it does not invite the possibility that canditates will accept the risk inherent in the legislation being considered before this committee to put on their ads in the view that they might be more effective than any granted reply. It also may not be so easily seen as having a chilling effect on speech.

We are neither so bold nor so arrogant as to believe either of these proposals are the sole sources of wisdom. It could be possible to eliminate the most egregious sources of demagogic advertisements by eliminating the 30-second and one-minute spot. It might be possible with difficulty, to eliminate all paid advertisements altogether and allocate free time to candidates. But each of these proposals are likely to bring the concerted opposition of the organized media.

But whatever the formula, something should and must be done.

Although I am not a lawyer, I would like to say a few words about the Constitutionality of legislating in this area because inevitably the question of free speech is raised when legislating in this area.

I do not believe that the framers of our Constitution envisaged freedom of speech for talking cows or for actors playing Fidel Castro or for bloodhounds trailing officeholders. When we moved into the television age, we took a quantum leap into technology. For television is not simply another means of communication. It is to conventional means of communications what nuclear weaponry is to conventional weaponry. It adds a whole new and destructive dimension of the issue of communications, through the manipulation of emotions. And to carry the analogy one step further, as it is desirable to regulate the use of conventional weaponry and essential to regulate the use of nuclear weaponry, it may or may not be desirable to regulate other forms of speech (and I believe it is not), but it is essential to regulate televised political advertising.

For whether or not one of the standards that permitted the Supreme Court to rule in the *Red Lion* case that television was a special medium when it came to the issue of speech—the standard of limitation in the number of outlets, which may be open to question by virtue of the advent of cable and satellite technology—the other two criteria for that judgment—the cost of access and the pervasiveness and effectiveness of the reach of televised communication will continue to set that medium off from all others.

The proposals being considered in this hearing are not to undercut free expression of views but to liberate that free expression from the cloud of image-making, distortion and demagoguery that is the current method of communication. It is to restore debate, civility, answerability and discussion to the campaign process in television without limiting either how much an individual or group can advertise or what they may want to say.

If we can, as the Court has so ruled, demand by law truth in commercial advertising on television; if we can zone pornography, as Courts have ruled we can, to certain areas in cities to protect minors; if we can be rid of liquor and cigarette advertising on the air, then I think it should be possible to restore debate and control the deleterious effects of political advertising on television, especially in view of their negative impact on the political process.

The issue before this Committee is a part of the fundamental issue of our age. Technology and science grow like topsy, but not all of that growth constitutes progress. The fact that children today now spend their summers freed from the fear of polio attests to the fact science and technology can produce progress. The fact that our air is foul, our cities are decaying and congested and the incidence of cancer keeps increasing is testimony to the fact that all products of technology do not constitute progress.

The task of govenment is to sort out what constitutes progress, what is beneficial for society and to encourage its growth; and conversely to determine what may pose hazards for that society and control or stop its growth. Televised political advertisements as they are currently being practiced constitutes a technological development not in the interests of the citizenry or polity. They can and must be regulated.

I want to take this opportunity to again thank this committee for having me appear, to offer it any additional assistance in its deliberations and to express my gratitude that it has opened this issue for public debate and scrutiny, and perhaps, it is profoundly to be hoped, for its constructive resolution.

I ask, that not inconsistent with the demands for space and the cost of paper, a number of additional materials be included into the record, some of which were part of a hearing held three years ago before the Senate Committee on Rules and Administration. These materials include:

1. S. 2509; Introduced in the 98th Congress and the floor statements attendant to its introduction, and a legal brief defending its Constitutionality.
2. The Committee for the Study of the American Electorate Study of how other democracies regulate their television political advertising, done by Austin Ranney and Howard Penniman of the American Enterprise Institute.
3. Two articles on this issue by this author.
4. Two tables on campaign costs and media costs.
5. A compendium of selected quotations relating to the importance of political consultants and television in campaigns.
6. Documents relating to the proportion of campaign budgets devoted to advertising.
7. A compendium of selected quotations on packaging and selling of candidates and issues.
8. A memorandum on costs of production.
9. A summary of a Nielson Report on Television and a Roper survey of trends and attitudes toward television which relate to this issue.
10. Three memorandum relating to: a. the impact of media on campaign costs; a memorandum on media spending; and a memorandum on the increase in the cost of the purchase of political advertising time in media outlets.
11. My testimony before the Senate Committee on Rules and Administration, September 29, 1983.
12. As is deemed useful our reports on voter turnout trends in the 1980, 1982, and our preliminary report on the 1984 election.

The CHAIRMAN. The next witness is Mr. Steven Sharp, chairman of the American Bar Association's special committee on election law and voter participation.

Mr. Sharp, thank you very much for being with us.

STATEMENT OF STEPHEN A. SHARP, CHAIRMAN, AMERICAN BAR ASSOCIATION'S SPECIAL COMMITTEE ON ELECTION LAW AND VOTER PARTICIPATION

Mr. SHARP. Thank you, Mr. Chairman.

My name is Stephen Sharp, and I serve as chairman of the ABA's special committee on election law and voter participation. I am in private law practice here in Washington. Previously I was a commissioner and general counsel of the Federal Communications Commission. The ABA appreciates this opportunity to participate in legislative deliberations on questions concerning Federal campaigns, elections, and the political process.

The ABA's special committee on election law and voter participation was the outgrowth of the association's awareness of the need for lawyers to devote greater attention to proposals for improvement of the Federal election process. With the enactment of some of these changes and with the attendant increase in the regulation of the political process, even more thorough study of the role of lawyers and the legal system in campaigns and elections is warranted.

The committee was established to look at both the policy implications of statutes and regulations governing elections and the more practical questions surrounding the implementation of those laws.

Mr. Chairman, during our recent annual meeting, the theme of your thoughtful speech might well be the theme of these hearings. If the democratic process is malfunctioning, we must make it work. You went on to suggest that if the bar is not committed to making democracy work, who is. Senator, we are.

Over the past decade, the ABA committee has looked primarily at legal issues affecting voter participation and has sought ways to enhance the integrity of the franchise and the importance of each voter in making the process work. That is by assuring citizens control of our Government through the election of public officials committed to our individual and national interests.

Prominent areas where our committee has been active include political broadcast regulation, campaign financing, the current and future role of political parties, vote fraud, and the use of independent regulatory structures to administer campaign laws. Some of these activities have been geared to deregulating the process; others have favored more regulation, but all have been conducted in the context that whatever regulatory structure exists should be neutral with respect to challengers and incumbents, and fair to both candidates and voters.

An electoral system which informs voters and maintains both actual and perceived fairness is one which will encourage voter participation in the process. Active, voluntary participation in the process by the highest number of citizens is not only a means of achieving political stability, it is the essence of democracy.

In addition to the specific policies that our committee has proposed and the ABA has adopted, the ABA committee has played perhaps a more useful role as a convener of experts. We have over the years brought together politicians, reporters, lawyers, political consultants and others to search for means of strengthening voter participation in its broadest sense. We have often discovered, however, that agreement on a particular solution comes easier than agreement on whether a perceived problem is a real problem.

It is in this context that I would return to your July 7 speech to the ABA. In that address you fairly state that many of the real and perceived problems or characteristics of our electoral process—your speech has prompted us to review our current efforts and to determine how we might best respond to your call for the development of a model or a standard for political campaigns.

The primary focus of your speech troubles us all, but putting our finger on the root cause is a little more elusive. The use of innuendo, half-truths, and outright deception as campaign tactics hardly can be said to contribute to an informed electorate, or to a healthy perception of politicians, politics or government. Such tactics have been with us since the beginnings of politics and seem unlikely to abate in the future. As part of the process, issues of public education about our democracy must not be overlooked, and questions about public education raise questions about the responsibility of the public, not just politicians to improve the process. As Adlai Stevenson noted in 1952, "Your public servants serve you right; indeed, often they serve you better than your apathy and indifference deserve."

To the extent that legislative action seems appropriate, such action must take care to protect the effective voicing of legitimate criticism of government and candidates, to protect the constitutional rights of all participants in the process, to distribute fairly all regulatory burdens, and not to attempt indirectly that which could or should not be done directly.

We should keep in mind that questionable campaign tactics are also part of a broader scope of issues surrounding the fairness of campaigns and citizens' perceptions of government and the political process. Any attempt to solve a problem in one area of the process inevitably affects other areas, and careful consideration of the impact is essential.

In recent years there has been an increase in attention given to negative advertising in campaigns. We have seen media campaigns directed against candidates and their supporters, some of which has been less than enlightening. In some cases, some advertising may have had an impact on the outcome of the campaign. Whether it had an effect at the polls, it clearly has had a negative effect on voters' perception of the political process, of the people involved in that process, and of those governing at State, national and local levels.

We see a danger that negative campaigning, when carried beyond fair and legitimate criticism, will reduce citizen participation in the electoral process and will retard the ability of citizens to make informed choices.

Mr. Chairman, you have called on the ABA to help fashion a higher standard of conduct in the American political campaign.

Consistent with our ABA mandate to study and recommend legal proposals to improve the electoral process, we will direct our attention to your new challenge and will look forward to working with you in the development of this agenda.

[The attachment follows:]

APPENDIX A.—ABA POLICY POSITIONS

Absentee Balloting: Urge recodification of federal statutes governing absentee balloting procedures for military personnel and U.S. civilians abroad, and granting of federal assistance to states that adopt federal provisions. August 1980.

Districting: Support single-member districting for state legislatures and certain local government entities. February 1981.

Election of the President: Support proposed constitutional amendment providing for election of the President and Vice-President by direct popular vote and abolition of the Electoral College. February 1967 and February 1974.

Equal-Time Provision of Communications Act: Support legislation repealing equal time provision as to presidential candidates and amending as to congressional candidates. August 1975.

Federal Campaign Financing: Support legislation for federal campaign financing which includes principles concerning contribution and expenditure limits and standards for providing matching federal funds for presidential and congressional candidates. August 1975.

Federal Election Commission: Support the creation and independent functioning of a Federal Election Commission. August 1975 and February 1976.

Postcard Voter Registration: Support legislation creating a federal administration and procedures and funding for voter registration by mail for federal elections. August 1974.

Presidential Selection: Support certain modifications to the presidential selection process. January 1982.

Twenty-Fifth Amendment: Support joint congressional hearings pursuant to 25th Amendment procedures for filling vacancy in the Office of Vice-President. August 1974.

Vice-Presidency: Support retention of the constitutional Office of Vice President and involvement of the Vice-President in the operations of the presidency; urge presidential contenders to announce tentative lists of possible vice-presidential running-mates, and favor televised debate by vice-presidential candidates in any future presidential debates. February 1977.

Voter Participation: Urge the President to appoint a commission to study the decline in voter participation, support the enactment of legislation that encourages voter participation, including fair congressional redistricting, and urge the state and local bars to aid the Association in improving voter participation. February 1979.

Voting Rights: Support extension of the Voting Rights Act of 1965, with amendments. August 1981.

The CHAIRMAN. Mr. Sharp, I very much appreciate your testimony and the interest of the ABA in this area.

As you point out, the American Bar Association was good enough to ask me to speak at the last convention, and I did speak on the subject of what has happened to elections, and expressed my view that the ABA was in a position to take the lead in this area.

Maybe this legislation that is before us is a good idea maybe it is not. It seems to me, though, that the solution to the present sickening condition of political campaigns, should not just be in the hands of people here in Congress. It should be in the hands of the American public in general, and particularly that body of people who are used to the vigorous debate of real issues, and yet vigorous debate within some sort of framework that provides for decency and provides for fairness.

In the trial of a lawsuit, all the relevant issues are supposed to be vigorously presented, and debated and the focus is on those relevant issues. There is a joining of issues. That is what the pleading process is all about. The full presentation of the position of the litigants would not be served by turning the trial of a lawsuit into open-ended verbal abuse, and in fact, that is not permitted by the judge. Everything does not go in the trial of a lawsuit, and yet the trial of a lawsuit is clearly something that is encompassed and ultimately governed by our Bill of Rights.

If anyone deserves protection, it is a litigant, especially in a criminal trial where his or her liberty is in jeopardy, and yet everything does not go in the courtroom. Mudslinging does not go in the courtroom. Badgering people does not go in the courtroom. Smears and lies do not go in the courtroom, and it seems to me that that group of people in our country who have a special talent and a special training for the vigorous presentation of ideas can offer a great deal to us in suggesting a way out of this really revolting mess that is the present state of political campaigns in American.

So I very much appreciate your being here.

I do not know if you have any rejoinder you would like to make to my comments.

Mr. SHARP. As I said, our committee is studying this area. We are also studying this year particularly the role of political parties in the electoral process and what legal steps or suggested policy steps in terms of campaign laws might enhance the role of parties relative to other participants in the political process.

I also would certainly request that a copy of your remarks to the bar association in July be included in the record of this hearing. I think they are very thoughtful and very helpful, and I think they stirred a lot of lawyers who were there to thinking, and I think it was a very useful set of remarks.

The CHAIRMAN. Thank you very much.

Senator Hollings.

Senator HOLLINGS. Yes.

Mr. Sharp, most respectfully, what have you told me about this bill this morning?

Mr. SHARP. What I said this morning essentially, Senator Hollings, is I agreed with you with respect to the problem. I am not sure that this bill or any of the bills that I have seen, without further study of the constitutionality and of the practicality of implementation, is adequate. I think from the discussion that has preceded this, it becomes somewhat evident that none of these particular proposals seem to be the ultimate solution to the problem. I am not sure there is a solution to the problem in a total sense. There is always that tendency to be negative in a campaign or to attack your opponent. That just seems to be the nature of the system.

However, there probably are ways in which we can examine the communications laws and the electoral laws to see whether or not there is a way which we can do this, at the same time protecting the various rights involved.

You have to be very careful with respect to constitutional rights. I realize you are quite sensitive to that. And you have some practical problems in terms of implementing any type of system. I have lived with the political broadcasting laws now for about 15 or so years on an almost daily basis, both in my time at the FCC, which encompassed 8 years, plus private law practice. I have seen how they work and I have seen how they do not work. It is a very difficult area.

Senator Hollings. Do you think that this bill is workable from your expertise?

Mr. Sharp. I would suggest that the bill needs some revisions. I think that there are certain areas, certain concepts in the bill which have a great deal of potential. I think some of the details need ironing out. That is a matter, if I had the time to sit down and look at the text and work through it with your staff, I think we can probably——

Senator Hollings. We would appreciate that.

What about the constitutionality? What you are saying now at this particular point is the ABA has made no decision with respect to the constitutionality of this bill.

Mr. Sharp. Yes, sir; that is correct. The committee is here testifying on behalf of the ABA with respect to our general mandate to examine this area. As you know, the ABA's policy is not to endorse or oppose legislation unless authority has been granted by the house of delegates, and the House has not yet considered this particular set of circumstances.

We will take it up with our committee at its next meeting. We will proceed to deal with that, and if we can get it to the house of delegates by the next meeting, then we can get back with you on that. But in the meantime, we can work with your staff to see if we cannot work on this.

Senator Hollings. Thank you very much.

Thank you, Mr. Chairman.

The Chairman. Senator Pressler.

Senator Pressler. Yes.

I would like to submit this question to you.

Sometimes negative campaigning might be a good thing. For example, let's say a public official only had a 50-percent voting record on the Senate floor or the House floor. Would it be wrong for an opponent to point that out? Or let's say that in 20 years of serving in Congress a Member had never had an amendment or a bill passed.

Senator Ford. The public would probably like that.

Senator Pressler. That might be a positive thing in this day and age, but a challenger has to point out why he is better than the person in office.

Let's go back to the 50-percent attendance record on the Senate floor. There might have been a reason for it. He might have been sick. There might be a lot of reasons. But would it be wrong for me or for someone to say our incumbent Senator has only voted 50 percent of the time on the Senate floor? Is that a negative ad?

Mr. Sharp. That is a real problem in the sense that there are two aspects of that, and one is how you do it, in terms of creating an impression. The statement itself may very well be true, and whether it is considered to be negative, I guess if you had a 50-percent record you could say the cup was half full, but the question is how full does it have to be.

Then you get to the issues of perception as to what makes an effective Senator, what makes an effective Congressman? Do you have to be on the floor? Do you have to make 50 percent of the votes, 100 percent of the votes? Those are issues of perception which one candidate may differ with another candidate. Somebody may think that it is important to be there for every vote and not be able to make all the committee meetings, or be able to meet with constituents, or whatever the various tradeoffs are that one faces when you have only 24 hours in a day.

But to take a campaign spot like that and to say my opponent was only there 50 percent of the time, I do not know. It could be unfair, it could be not unfair. It could be very well legitimate criticism.

I think the tenor of unfairness, the focus of this is not against criticism but on how the criticism is done. Does it create perceptions that are unfair whereas the facts may be there?

Senator **Pressler**. Or is it a negative ad if somebody points out something about their oponent's stands on issues that they are not emphasizing? For example, let's say that I am totally a free trader but I am spending all my time talking about railroads. Is it wrong for my opponent to run an ad to people who might be protectionistic saying do you know that Senator Pressler is a free trader to people who might be protectionistic? Is that a negative ad?

Mr. **Sharp**. I would have to say that that is not a negative ad. There is a certain measure of information that has to get to the voters. If you want the voter to make an informed decision, then the voter has to know, if in fact that is true, and of course, when you say free trader, that has its own connotations, but if you say you voted for this bill or that bill and you can say and I disagreed with that, that is a clearly legitimate criticism and a divergence on issues.

Senator **Pressler**. One problem is how do you describe negative ads. My opponents might not run a negative ad, but they might get some information out about me that I would consider negative, and of course, I would like to get some information out about them. If you are behind in a race and the public does not know about something, how do you let them know without running a negative ad?

The **Chairman**. If I could just interject, this bill does not prohibit negative advertising. It does not. All this bill says is if you are going to do it, do it with your own face and your own voice. If you do not do it with your own face and your own voice, the opponent gets a free chance to rebut it or to respond, but it does not shut off the ads. The idea is not to shut off debate or discussion of the issues.

Senator **Pressler**. And I am very much in favor of that, but let me ask you this. What if some group, such as the teachers, feels that an issue is not being addressed at all in the election, and they want people to know that a certain Senator had voted against education, whatever that means. Then if they ran that ad, there would be a free response time under the bill?

The **Chairman**. Yes.

Senator **Pressler**. But if it gave any criticism of him, then it would be considered a negative ad?

The **Chairman**. No. In other words, the person against whom the ad operates, in the case of a PAC or an interloper, would get time to respond.

Mr. **SHARP**. I think your question ultimately gets to the critical issue of the question of definition, and then what does the definition trigger? If you criticize your opponent, you say my opponent voted for this bill, and I think that was wrong. Is that negative or is it critical? And if so, does your opponent get free time to respond to what you have just stated?

Senator **PRESSLER**. He would not get free time if I appeared criticizing him.

Mr. **SHARP**. Yes; that is the difference in terms of the structure.

The **CHAIRMAN**. Senator Ford.

Senator **FORD**. Mr. Chairman, let's talk about the committee for a minute and where we are coming from here with Mr. Sharp.

When a piece of legislation is marked up by this committee and presented to the Senate floor, whose name is on it? That is your name. And that eliminates the ability of my name, if it was my bill or Senator Gorton or Pressler or Hollings. The introduction of that bill may get some time or space, but if every bill I introduced happened to be assigned to the Commerce Committee, then I could very well be accused of not ever passing a bill because my name was not on it.

On the other side of that coin, Senator Danforth could catch a lot of Hades about some bills this committee passed that he was very much opposed to but his name was on it. That is the nature of the brute.

So somehow I do not think we are ever going to change that unless we change the system itself. You know, there are some problems we cannot offset.

Now, Mr. Sharp, how do you keep campaigns from being just TV ads developed by an outstanding PR firm and bounced back and forth? How are we going to prevent that, because let me read your statement here, "We see a danger that negative campaigning, when carried beyond fair and legitimate criticism."

Now, define fair and legitimate criticism for me. When would you take a case for an individual and sue?

Mr. **SHARP**. Well, I think the issue with respect to fair and legitimate criticism is what Senator Pressler and I were just discussing, and that is that he raised the question of what about the 50-percent voting record?

Senator **FORD**. I think that is a legitimate question.

Mr. **SHARP**. I think you are right, and when you get down to the drafting the question ultimately is if you are going to do this, somewhere you have to draw the line.

Senator **FORD**. Now, is that an issue?

Mr. **SHARP**. Is which an issue?

Senator **FORD**. Would that be in the broad definition of issues?

Mr. **SHARP**. The voting record?

Senator **FORD**. Yes.

Mr. **SHARP**. I think you would have to say so, if you are talking about issues like should we have free trade or should we vote 50 percent of the time. I notice that Mr. Gans lamented the fact that there was no discussion or very little discussion of issues. We tend to describe the issues in a political campaign as the pro and con of a particular bill or a policy. I think we have to keep in mind that in my experience with voters, the issue they are primarily concerned with is the ability and the integrity of the candidate, and if the person is going to be elected, they want to know how that person is going to handle themself on an issue that they may have never even heard of. They may not understand the issues, but whether through watching television or shaking hands or looking them in the eye or whatever it is, the want to have the feel that that person is someone they can trust to do a good job.

Now, in that sense, the issue may be do I want somebody there 100 percent of the time on the floor, do I think that is important? Each person is going to have a slightly different perception of that. But it is clearly the issue.

Senator FORD. Well, what is beyond fair and legitimate criticism? I know it is what the courts say ultimately, but in your personal judgment, you do not have to represent the bar or your association, what is beyond fair and legitimate criticism?

Mr. SHARP. I think really, criticism has to be based on fact, of course. I think everyone can agree that there should be a factful basis.

Senator FORD. What if it is 95 percent false and 5 percent true?

Mr. SHARP. I think if you are talking about a 95-percent false, it is not based in fact, and the question is, for instance, if I said you had a 50-percent voting record, and you did not have a 50-percent voting record, you had a 100-percent voting record, then that is clearly unfair.

Senator FORD. Now, how do I get to my opponent if we do not have some way—just run another ad, and then we become TV commercials?

Mr. SHARP. That seems to be the dilemma we are faced with at the moment. Once you have started this process, as you were discussing earlier with respect to the hound dogs, you may have to find a way to respond to that.

Senator FORD. Well, what criteria is here to be sure that particularly opposition tells it all, if I have a 100-percent voting record, and so far this year I have, and my opponent says he has missed 50 percent?

Mr. SHARP. There are ways that you could explore and I am just speaking as an individual, and I am speaking, as I try to think this thing through and not spending much time on it, but if you are concerned about the truth of the ads, perhaps we should look at truth in advertising, and if you want to get into that area where there is a blatant untruth, then you have advertising laws which govern these things.

If you want to talk about identification of those responsible for the ad section 317 of the Communications Act requires sponsorship identification. That can be either strengthened or the implementation can be strengthened.

There are options I think available which should be explored, but I think should be explored with a good deal of depth.

The CHAIRMAN. Mr. Sharp, thank you very much for your testimony. We have a number of additional witnesses, and I am afraid we are going to have to move on.

Ms. Ridings, Mr. Wertheimer and Mr. Guggenheim have agreed to appear on a panel, presenting their testimony one after another and then being questioned as a panel, and I think that would facilitate the timing of the situation.

I want to thank you all very much for being here and for your patience, and for waiting so long to testify.

Ms. Ridings, would you like to proceed?

STATEMENTS OF DOROTHY RIDINGS, PRESIDENT, LEAGUE OF WOMEN VOTERS; FRED WERTHEIMER, PRESIDENT, COMMON CAUSE; AND CHARLES GUGGENHEIM, PRESIDENT, GUGGENHEIM PRODUCTIONS, INC.

Ms. Ridings. Thank you, Mr. Chairman, members of the committee. We have a brief statement from the League of Women Voters, and I will not read it. I will make a few opening comments, however.

I am Dorothy Ridings, president of the League of Women Voters of the United States, and you all know the League. You know that we are the national umbrella for 1,300 local and State leagues in all 50 States, Virgin Islands, Puerto Rico and the District of Columbia. And the League has for its entire 65 years of life had a deep and abiding interest in the whole gamut of electoral issues, particularly those surrounding campaigns and campaign practices.

We are a nonpartisan organization. We do not endorse or oppose candidates for political office nor political parties, but are very interested in the electoral process. We are very interested in the citizen voter, the integrity of the electoral process, and the impact of elements of campaigning such as the focus you are giving here today on negative advertising.

I will also say we are not here to fully endorse the particular piece of legislation that you have laid on the table, although we commend you and this committee for your attempts to improve the quality of the electoral process. We stand ready to work with you and to do some more indepth research not only of this particular piece of legislation, but other pieces of legislation that are being considered along this line because we share your concerns.

But I would be less than honest if I did not tell you that at this moment we are more concerned about some particularly pressing matters that we think also have a real impact on the electoral process, or have the potential for impact on the process, such as preservation of public financing for our Presidential campaigns, which we are in danger of losing. And I would speak to you as individual Members of the Senate who may be addressing that issue and helping preserve the checkoff box on our income tax forms.

Another pressing matter is the Supreme Court case on redistricting, which may seem a little far afield, but I would submit that it is not. I was delighted that a bipartisan group of Members of Congress joined many of us on that side in our Supreme Court case.

Still another issue is our continuing 5-year attempt to get the television broadcasters to quit the odious practice of early projection of election returns, which we think also has an impact, and a very negative impact, on the electoral process.

We do share your concerns about negative political advertising, and I would only make a few comments in that regard, because too often in the heat of political campaigning it has been awfully easy to concentrate on the vote instead of the voter. That is where our concern lies because we do believe that there is a great need for honest answers to policy questions from candidates about how they stand on political issues. We think that voters do need clear proposals for solving the problems of the country, their States and their nations. And they need to hear about the issues.

We have had a slogan for some time, Issues, Not Images, and that holds up just as well in 1985 as it did many years ago when we started using it.

I would mention just a few things in this regard as well, the areas where the League has been working quite diligently to try to contribute to the forum for free and honest debate—because there are ways to use the media fairly and honestly to counteract cyclical, unscrupulous campaigners. We have instituted our own program to combat the effects of slick, sometimes negative media packaged candidacies, and we do include debates as part of that process. We recognize that the content and format of debates leave a lot of room for improvement, and we remain committed to that process.

We also have a commitment to produce such literature as voter guides, which the League is well known for throughout the country, to allow the candidates to express their own views on the issues without the intermediary of an interpretive narrative. We also have publications that explain the electoral process. I brought a few with me. I am not going to enter them in the record because they are copywritten, but I would like to leave them for the committee's consideration.

We do this publication every 4 years, choosing the President. This is the 1984 edition, and it does include some material in here about campaign advertising. Our publication, Facts on PACs, which is a narrative on the pros and cons of political action committees, and certainly you have some interest there. And one I hold up for your attention because it is one that has attracted a lot of attention from the public, and it is called Pick a Candidate. It really is a very simple little brochure that has kind of surprised us with its popularity because it talks directly to a voter about how to look at a candidate and a campaign and to evaluate the issues and the components of the campaign for yourself.

For example, there is a small section in here about radio and television advertising, and commercials, political commercials. It asks you to ask certain questions of yourself when you see certain kinds of campaign advertising. It also goes on to talk about what to look for, such as name calling, rumor mongering, loaded statements, guilt by association, catch words, baiting and that sort of thing, which we know is all too common.

I would tell you that at the conclusion of one of the Democratic primary debates sponsored by the League last spring, one in which at least one member of the panel was a participant, in Atlanta, GA, we sponsored a very brief commercial ourselves offering this publication without charge to anybody who sent us a self-addressed, stamped envelope. They had to pay double postage to get this, and we were rather overwhelmed with the public's interest in a short explanation of how to look at campaigns and candidates, particularly through the advertising that is put forth, and to evaluate them for themselves.

I would mention one other thing. We are very active in promoting the American Association of Advertising Agencies' code of ethics for political advertising, which is proposed by the association, and we endorse it, as do both of the political parties. We were instrumental just in this last campaign in getting an inclusion in that code of ethics of gender as well as race, color, national origin, ethnic origin and a whole host of other things, as being those elements a fair and honest campaign should not exploit. I do not know if I need to use an illustration, but for example, the feminine hand reaching for the red hot line, or the implication that someone by ethnic origin would be suspect as less of an American because of their ethnic origin, or that a person of a certain race or color would be suspect simply because of that race or color rather than looking at the person for themselves.

We do again join with you in your concern for the impact of negative advertising as one element that must continue to be looked at in the continuing process to improve our electoral process. We are delighted that you are doing this. We will continue to work with you on S. 1310 as well as the other pieces of legislation that may be offered for your consideration, either as amendment or as substitution.

I would only tell you that we applaud your efforts to call public attention to something that is increasingly a problem for American voters and the electoral process itself.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF DOROTHY S. RIDINGS, PRESIDENT, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

I am Dorothy S. Ridings, President of the League of Women Voters of the United States. I am pleased to be here today to discuss fair campaign practices, a subject of great interest to the League at all levels, national, state and local

The League of Women Voters is a nonpartisan political organization with a quarter million members and supporters in more than 1,300 state and local Leagues in all 50 states, the District of Columbia, the Virgin Islands and Puerto Rico. We do not support or oppose candidates for political office.

The League of Women Voters has a long, proud history of highlighting issues during election campaigns and of helping voters get clear, honst answers to their questions. We are dedicated to enhancing citizen participation in federal, state and local government decisions and increasing citizen participation in the election process.

We share the concerns that the sponsors of the "Clean Campaign Act of 1985" have raised about negative political advertising. We commend the efforts of elected officials to improve the quality of the electoral process and the willingness of Members of Congress to explore ways to make campaigns more truthful and of more real use to voters.

The democratic process depends on free, open and robust political debate at all times—especially during campaigns. Its integrity is the responsibility of all citizens, but it most critically depends on those in positions to affect the electoral process. Democracy can only work if every candidate, every press secretary, every advertiser, every party leader and every journalist and broadcaster accepts his or her responsibility for fair campaign practices.

In the heat of political battle it has often been all too easy to forget the true focus of campaigns: the voter. Voters need honest answers from candidates about their positions on issues that concern them. They need clear proposals for solving the problems facing their nation, their states and their communities. They need to hear about issues, not images.

It is easy sometimes for campaigners to forget that the typical citizen is results-oriented. As President Franklin Delano Roosevelt said four decades ago: ". . . the future lies with those wise political leaders who realize that the great public is interested more in government than in politics." In the mid-1980s, we still see in many cases that images and politics supersede the citizen's attempt to focus on the issues and the problems of government.

Politics may not have changed that much since the Roosevelt era, but communications technology has. Style is now a far more important component of campaigns and a variety of new communications techniques are used to sway voters without addressing the issues of the day. It is important to keep these technological changes in mind, and find ways to use them constructively for the benefit of the voters who are trying to make political choices.

Citizen education to enhance the political debate is a role the League of Women Voters embraces. As a grassroots citizen organization, the League is concerned about the effects of mudslinging and untruthful campaigns managed with the attitude of "win at all costs." This cynical approach to campaigning not only degrades the democratic electoral process, it diminishes candidates and voters alike. The current turn towards negative media campaigns is especially dangerous when it involves racial and gender discrimination. Any misuse of these topics has the most insidious, deleterious effects, and it must not be tolerated.

There are ways to use the media fairly, and to counteract cynical, unscrupulous campaigners. The League has instituted its own program to combat the effects of slick, media-packaged candidates, including televised debates, printed voter guides and publications that explain the electoral process. In addition, we have endorsed the American Association of Advertising Agencies' Code of Ethics for Political Advertising. We have also adopted a position on campaign finance, supporting public financing, disclosure and other fair campaign practices.

At the national level, the League's citizen education efforts are marked most prominently by presidential debates. However candidates and their media advisors prepare for them, and however long and painstaking the negotiations may be, in these debates the candidates must face each other alone, without the benefit of instant "message packaging" by their issues staff, or cosmetic adjustments by their media advisors. These debates remain the only opportunity the pulic has to see and hear the presidential candidates at the same time, in the same place and under the same conditions.

The League's efforts to get campaigns back to issues extends from the presidential race to congressional offices, and to statewide and local level offices as well. In a nationally-coordinated project in 1984, Leagues of Women Voters around the country sponsored televised debates in 60 House districts and nine Senate races focusing on national security issues. In addition, Leagues throughout the country sponsored countless other debates in races from the U.S. Senate to local school boards.

The League of Women Voters has a tradition of providing nonpartisan citizen information since its founding in 1920. We welcome this role, but it must be enhanced by others active campaigns. Candidates have the ultimate responsibility to communicate their ideas and opinions to voters. Parties have the role of providing partisan information and illuminating partisan differences. Broadcasters and advertisers also are essential communicators; they put their mark on political communications and shape the political climate.

Now is the time for reasoned debate on fair campaign practices, in the absence of immediate campaign pressures, when electoral victory is a far-off goal. Campaigns must be focused on enlightening—not manipulating—the voters.

The CHAIRMAN. Thank you, Ms. Ridings.

Mr. Wertheimer.

Mr. WERTHEIMER. Thank you, Mr. Chairman.

We, too, appreciate the opportunity to be here. The general issue of campaign financing has been an issue of central concern to our organization throughout its existence. We think you are addressing an important area, and we commend you, the committee, the cosponsors of the bill for the leadership you are showing in exploring this area.

We, too, believe that there are larger questions, broader questions involved in the campaign finance area. We similarly are strongly opposed to any effort to do away with the dollar tax checkoff. We believe that the most fundamental problems in the campaign finance area cannot be solved until there is a comprehensive reform of the congressional system and the issue of the role of PACs is dealt with.

But having said that, I would also say that we feel what you are doing here is very important. The bill that has been introduced deals with really two different aspects of the role of negative advertising: the role of independent expenditures and the role of advertising between the candidates, and I would like to address them separately.

The problem of negative advertising in the case of independent expenditures is particularly acute for a couple of reasons. One, the question of accountability. A candidate attacks an opponent and ultimately must stand at the polls for that attack. An independent expenditure group does not. They can do or say whatever they want, and when it comes to the day of reckoning at the ballot box, they are not up there. So the kind of accountability that exists for candidates for what they say simply does not exist in the role of independent expenditures.

Terry Dolan perhaps put this best, the head of NCPAC and a leading proponent of independent expenditures, when he said a group like ours could lie through its teeth, and the candidate it helps stays clean. That is a fundamental problem.

The second big problem is it just distorts the competitive balance between the candidates and the parties because all of a sudden you have an unknown player who can spend $1, $500,000, $1 million, or $5 million and inject themselves into the race in a way that a candidate has not or may not be able to plan for.

Independent expenditures and their impact on the political process have been widely condemned. Even though they were primarily intended to benefit Republicans in the 1980 presidential election, the then Chairman of the RNC, Richard Richards, said independent spenders create all kinds of mischief, and added, if campaigns are going to be honest, the candidates have to be responsible for everything that is done.

David Broder has written the din of negative advertising does tend to denigrate and drown out the healthy debate between candidates and parties that ought to be the heart of any campaign.

Congress has in the past enacted limits on the amount that independent spenders could spend, and the court has said no. The court has said that is an unconstitutional limitation on the rights of individuals and groups to speak. There are steps, however, that can be taken to balance the role of independent expenditures, and this bill in our view proposes the single most important step that can be taken. It does not, as stated, it does not prohibit independent expenditures. But it provides candidates with the capability to deal with them in a race, and given the kinds of money that can and have been spent on independent expenditures, we think that it not only would be an extraordinarily important step in restoring the integrity of the campaign finance system, but it really would in a major way help deal with the negative impact that independent expenditures have had on the political process.

By giving candidates the opportunity to respond, it adds, it does add some accountability back into the process by having these issues, if they are raised, answered.

As you pointed out, Mr. Chairman, in your remarks when you introduced the bill, it also deals with this question of trying to deal with huge sums flowing into your campaign and all of a sudden having to plan not for one but for many campaigns, as Senator Hollings talked about when he, with his remarks, when the bill was introduced.

This is not a perfect solution, and all of you know, and it has been made clear to day, there are no perfect solutions to these problems, but this is a very insidious problem for the political process, for candidates of both parties, for both political parties and we think you have a real solution here to deal with that problem.

With regard to the personal appearance provision, there are a series of concerns about that that we have raised in our testimony that we present to the committee and urge that you consider it as you look at that area of legislation.

We share the concerns expressed by the impact on the electorate by negative advertising. There still needs to be some way to differentiate from a public policy view between the very damaging impact on public participation, on alienation that comes out of negative advertising in television, and television is a different animal in this, as was mentioned earlier. It truly is a different player in the political arena. It magnifies, it often intensifies, it has the capacity for far, far greater impact, in my view, on the electorate than other forms of advertising.

There still has to be a way of distinguishing between the damaging impacts and the value to the political process of candidates forcefully explaining what their views are and of differentiating themselves with their opponents. It seems very hard to accomplish that by statutory language, and that is one of the concerns we raise for the committee.

There are a couple of other concerns I would like to note in closing. By channeling television advertising into personal appearances, we do have to look at the question of whether and to what extent that is enhancing that single factor of how a person looks on television, how they physically look, how they come across versus the variety of other factors involved in trying to campaign and get your point of view across.

Second, it does pick out one area and tell a candidate how to conduct their campaign by statute. We have been generally reluctant to see statutes telling candidates how to run their campaigns. That is simply a factor we think that should be examined.

The last one and perhaps the most difficult, by nature, incumbents are far better known than their challengers generally. That is not always true. Incumbents have a stake in ignoring their challengers in those kinds of situations and have a stake in stressing the positive sides of their records. Challengers who are less known are more likely, if at all, to run an effective candidacy, to have to be able to deal with their candidate's records and campaign directly with regard to that. The net result of the impact of this may well be that this provision would apply primarily to challengers and have incumbents wind up being favored under the provision, and we think that is something that could tilt in the way of incumbents that may not be fair, and it is something we again urge you to look at.

So with respect to the second part of this legislation, we do see problems, but we do agree with your desire to try to get a handle on something that is now having a very negative impact on the political process.

With respect to the first, the independent expenditure provision, we think that could do extraordinary good in helping to deal with a difficult problem that is really unbalancing the campaign process.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF FRED WERTHEIMER, PRESIDENT, COMMON CAUSE

Thank you, Mr. Chairman and Members of the Committee, for this opportunity to testify today. As you know, the issue of campaign financing has been of central consern to Common Cause throughout its fifteen year history, and I am pleased to be able to present our views for this Committee's consideration. We believe that serious problems exist in the campaign financing system today, particularly in congressional races, where fundamental reforms are needed. We appreciate the interest shown by members of this Committee in examining some of those problems.

We would particularly like to thank the Chairman and Ranking Minority Member of this Committee for your leadership and initiative in searching for changes in federal communication laws to address major troublesome areas in current campaign practices. We hope that the efforts of this Committee will lead to statutory changes that could help to blunt some of the unhealthy and negative aspects which have become all too commonplace in American elections.

We believe this is time when we should be moving to address unsolved problems in the campaign financing system; unfortunately, the Administration is presently proposing to eliminate the reform which has fundamentally improved the way in which presidential campaigns are conducted. We urge all members of this Committee to consider the important difference the public financing system has made in presidential campaigns and to reject any attempts to scrap the dollar tax check-off.

I would like to begin by adding my endorsement to the general views expressed by Senator Danforth, Senator Hollings, and other members of this Committee about the troubling impact of negative campaigning in American politics. Negative campaigning has always been part of our political process--but through radio and especially television, negative campaigning has approached new heights. Negative advertising does feed voter cynicism, citizen apathy, and an unhealthy low regard for public office. While campaigns are intended to provide voters with information about candidates, the steady and repetitious drumbeat of negative television ads in some cases adds little real information of value and simply contributes to a general alienation with the political process. Television, furthermore, has a special quality—it magnifies and often intensifies the message.

The problem with negative advertising is particularly acute in the case of so-called independent expenditures—expenditures made by a group or individual on behalf of—or often agains—a candidate without consultation or cooperation with any candidate or candidate's representative. A candidate may attack his or her opponent during the course of the campaign, but the canditate who does the attacking still must stand before the voters. Not so with independent expenditure groups. These organizations do not have to provide voters with constructive policy alternatives and do not have to assume any responsibility at the ballot box for the consequences of their actions. Instead, they can simply attack—without responsibility to party or candidate or voter. As Terry Dolan of the National Conservative Political Action Committee (NCPAC) and a leader of the independent spending movement has said. "A group like ours could lie through its teeth, and the candidate it helps stays clean."

These activities have been widely condemned. Even though independent expenditures in the 1980 campaign were primarily intended to benefit Republican candidates, Richard Richards, then Chairman of the Republican National Committee, said at the time that independent spenders "create all kind of mischief" and added, "If campaigns are going to be honest, the candidates have to be responsible for everything that is done." Political columnist David Broder, in discussing independent expenditures, has written, "The din of negative advertising does tend to denigrate and drown out the healthy debate between candidates and parties that ought to be the heart of any campaign." And the New York Times noted, "To some people of both parties, such independent, politically unaccountable groups are the campaign equivalent of motorcycle gangs; even when they stay within the law, they are not a welcome sight."

The persistent use of independent spending in politics, in our view, alters the political process for the worse. Through independent spending, PACs and individuals can evade the intent of limits on direct contributions. They spend substantial sums—far in excess of statutory contribution limits—supporting or attacking candidates.

Independent spenders are unaccountable—such groups do not assume responsibility at election time; nor do they face the political impact of any misrepresentations they may make.

Independent spending can seriously distort the competition between candidates. Candidates are faced with spending not only by their opponents but also by independent groups. The fear of the possible intervention in a particular race by one of these independent spenders—perhaps capable of spending $250,000 or $500,000 or more in a single race—is one of the reasons why candidates increasingly build up huge campaign warchests—a factor which only escalates the campaign spending race which is already dangerously out of control.

As the members of this Committee are aware, the 1974 amendments to the Federal Election Campaign Act included a provision establishing a $1,000 limit on independent expenditures by an individual or group in an election. In enacting this limitation, Congress sought to prevent evasion of the Act's contribution limits under the guise of an independent expenditure effort. In the *Buckley* v. *Valeo* decision, the Supreme Court held that this provision was an unconstitutional violation of First Amendment rights. The Court's recent decision in another case (*Federal Election Commission* v. *National Conservative Political Action Committee,* U.S. , 105 S.Ct. 1459 (1985)) struck a more narrowly drawn provision which restricted independent expenditures in publicly financed presidential campaigns.

There are steps, however, which Congress can and should take to address the problem of independent expenditures which would help offset their harmful effect on the political process and still pass constitutional muster. I believe that S. 1310 contains the most important of those steps.

In saying this, however, we do not want to leave the impression that S. 1310 embodies all of the key changes which are necessary to be made in the congressional campaign financing system. S. 1310 is not designed to be a cure-all for the congressional campaign financing system, and it is not. We believe it is important to view independent expenditures in the appropriate context and to take a look at the overall problems of the congressional campaign financing system—problems which have reached crisis levels and which must be addressed by the Congress. The problem of independent expenditures in a serious one—but it is only part of a much larger problem.

For example, independent expenditures in congressional races in 1984 amounted to approximately $5.3 million; direct PAC contributions to candidates crossed the $100 million level. Unless Congress deals directly and forcefully with the problem of political action committees we are, in fact, not going to solve the fundamental campaign finance problem.

As Common Cause has long argued, PAC money is interested money, given to try to gain the eye and ear of Members of Congress. During the first six months of 1985, for example, PAC's gave $3.7 million to the members who serve on the tax-writing committees of Congress (Senate Finance and House Ways and Means)—a threefold increase over PAC giving to the same candidates during the first six months of the last election cycle when the tax reform issue was not at the forefront of the national agenda as it is today.

Coupled with the increase in PAC giving is a growing awareness that PAC money is given to make a difference in the legislative process—and the problems for our system of representation which that practice presents. Senator Bob Dole, for instance, has observed that "When these political action committees give money, they expect something in return other than good government. It is making it much more difficult to legislate. We may reach a point when everybody is buying something with PAC money. We can't get anything done." Senator Thomas Eagleton has said that the present campaign financing system "virtually forces members of Congress to go hat in hand, begging for money from special interests whose sole purpose for existing is to seek a *quid pro quo.* The scandal is taking place every day and will continue to do so while the present system is in place." And the industry trade journal Chemical Week last year warned, "[A] new force has intruded into our system of representative democracy that, if unchecked, could topple it or seriously hurt it. We refer to the phenomenon of Political Action Committees . . . The plain truth of the matter, no matter what gloss is put on it, is that PAC money aims at influencing congressional action. The other side of the coin is that new candidates and incumbents alike become beholden to their PAC benefactors. That's the whole point, isn't it?"

Congress must also address the issue of unlimited spending by candidates in congressional races. The congressional campaign financing system is ravaged by unlimited spending. Senator Barry Goldwater, in testimony before the Senate Rules Committee entitled "Unlimited Campaign Financing: A Crisis of Liberty", said, "Unlimited campaign spending eats at the heart of the democratic process. It feeds the growth of special interest groups created solely to channel money into political campaigns. It creates an impression that every candidate is bought and owned by the biggest givers. And it causes elected officials to devote more time to raising money than to their public duties." Senate candidates in the 1984 election spent in excess of $135 million. Winning Senate candidates spent, on the average, over $2.8 million in 1983-84 campaigns.

And all signs point to another record-breaking year in 1986. During the first six months of 1985, the 30 Senators facing re-election in 1986 raised over $20 million; on June 30, these candidates had in excess of $22 million on hand in anticipation of an election more than a year away.

We are reaching a consensus in this country that PAC's and the present system of financing congressional campaigns are absolutely inimical to our system of representative government. The big question remaining is whether that public consensus can be translated into a congressional consensus and congressional action.

The model for reform is in place. In 1974, Congress passed a comprehensive presidential campaign finance reform system—the public financing system—which has seen limits placed on spending coupled with increased reliance on small contributions from individual donors and decreased reliance on large contributions from special interests.

Unfortunately, Congress failed to enact a similar system for its own campaigns—and the growth in spending, increased reliance on PAC dollars, and decreasing importance of constituent dollars are the inevitable results.

I recognize that formal legislative jurisdiction over changes in federal election law—rather than federal communications law—does not rest with this Committee, yet we believe that solving the gripping problems of congressional campaign financing must be on the personal agenda of each and every Member of Congress.

THE CLEAN CAMPAIGN ACT OF 1985 (S. 1310)

In this Congress, Senator Danforth, along with Senators Hollings, Simon, Dixon, Goldwater, Pressler, Kassebaum, and Hatfield, have proposed S. 1310, the "Clean Campaign Act of 1985". The Clean Campaign Act purposes an amendment to the Communications Act of 1934, 47 U.S.C. § 315, to provide candidates for federal office with free, equal response time whenever a broadcaster had sold air time to an individual or political committee making an independent expenditure regarding that candidate. A broadcast licensee would be required to afford to the target of any independent expenditure advertisement aired on his station an opportunity during the same period of the day and for the same amount of time to present without charge a response to the ad. (S. 1310, Section (c)(1)).

We strongly support this proposal and believe it is a positive and important step in dealing with the ever-increasing problems in political campaigns caused by independent expenditures. (I would like to submit for the record an op-ed piece that appeared in the New York Times in 1981 on the response time concept). In proposing a response time provision for independent expenditures, S. 1310 takes a key step toward restoring the integrity of the campaing financing system. As Senator Danforth stated upon introducing this bill: "It . . . attempts to restore some balance to a campaign in which independent ads are aired. This provision will provide candidates with some ability to respond to messages that otherwise might be unanswerable."

The reasons for adopting a response time solution to independent spending are several. First, response time would help to protect the integrity of the present system of contribution limits by assuring that a candidate could respond without major expense to an independent expenditure campaign involving that candidate.

Second, providing candidates with response time would enable candidates to refute misrepresentations or other points made by independent spenders. This will provide some measure of accountability in independent spending activities, because the public will have more information with which to make an intelligent decision.

Finally, response time would help restore balance to the system which is currently distorted by escalating independent spending. In expressing his support as a cosponsor of S. 1310, Senator Hollings stated to his Senate colleagues: "We all have seen how PAC's can seriously damage the balance in a campaign through the expenditure of enormous amounts of money. In effect, a candidate budgets to fight one well-finanaced opponent but then ends up fighting many." A broadcast response time provision would help to limit that inequity.

THE CONSTITUTIONALITY OF RESPONSE TIME

We believe that the response time provision included in the Clean Campaign Act is constitutionally sound. We beleive that the responsibilities placed on broadcasters by such a proposal are an extension of existing communication standards which have been upheld by the courts and are consistent with the interpretation of First Amendment rights.

Critics of response time may raise two constitutional issues which we want to briefly address here. First, broadcasters may claim that the proposal will infringe upon their First Amendment rights by imposing requirements on what they must broadcast. Second, committees wishing to make independent expenditures may claim that the proposal will infringe upon their First Amendment right to make such expenditures.

Common Cause believes that the proposal for response time is constitutional for the following reasons:

(1) *The Supreme Court has upheld existing regulation requiring broadcasters to provide access to the airwaves*

The equal access and equal time provisions, embodies in Sections 312 and 315 of the Communications Act, respectively, impose significant requirements upon broadcasters to share their frequencies with other voices engaged in political discussions. Section 312 requires broadcasters to provide "reasonable access" to candidates and Section 315 requires broadcasters to provide "equal opportunities" to other candidates when the broadcaster allows one candidate to "use" his station. In addition, the Fairness Doctrine mandates that broadcasters devote a reasonable amount of time to the discussion of important public issues. If one side of an issue is presented, the broadcaster must give reasonable opportunity for the presentation of contrasting views on that issue.

The Fairness Doctrine encompasses two additional requirements upon broadcasters. First, if a broadcaster supports or opposes a candidate in a political editorial, he is obliged to notify other candidates for the same office of the date and time of the editorial, send them a script of the editorial, and offer the candidates or their spokespersons an opportunity to respond over the station. Second, if the station broadcasts a "personal attack" on any person, the broadcaster is again obligated to notify the subject of the attack, send him or her a script or summary of the attack and offer the person a "reasonable opportunity" to answer the attack over the station.

These regulations were upheld by the Supreme Court in *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367 (1969). The Court held that Congress has wide latitude to regulate broadcasters due to the scarcity of the medium, a fact which distinguishes television and radio from newspapers and other print periodicals. 345 U.S. 388–39. Because of this scarcity, the Court said that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." 395 U.S. at 388.

The Court held further that the First Amendment rights of broadcasters are subsidiary to the "collective right" of the people to have the broadcast medium "function consistently with the ends and purposes of the First Amendment." 395 U.S. at 390.

These principles were reaffirmed in *CBS* v. *FCC*, 435 U.S. 367 (1981), which upheld the "reasonable access" provisions of the Communications Act. 47 U.S.C. § 312. In *CBS*, the Court restated the holding in *Red Lion* that it is the First Amendment right of viewers and listeners, not the broadcasters, which is "paramount." 453 U.S. at 395.

(2) *The Supreme Court's reasoning in Red Lion and CBS supports the granting of response time to candidates who are targets of independent expenditures*

As a constitutional matter, the proposal for response time is indistinguishable from the access and fairness provisions which the Supreme Court has already found to be constitutional. The Court has held that Congress acted within its power when it directed broadcasters to grant reasonable access to the airwaves to candidates to provide equal time for responses to political ads, and to provide time which, in specified instances, is free. Thus, the elements of the response time proposal have already been found to be cnstitutional. In addition, the proposal serves the same compelling interests recognized by the Court in both *Red Lion* and *CBS*.

Arguments which are similar to the argument that reply time would unconstitutionally limit licensees' rights—by requiring access time to candidates to reply to advertisements—have not been well-received in earlier cases. As the Court in *Red Lion* explained, the First Amendment rights of the broadcasters are subsidiary to the rights of the candidates and the public. The broadcasters have an obligation to fulfill their fiduciary duty as public trustees of the airwaves, and can be compelled by Congress to make time available where Congress determines it is in the public interest to do so.

The proposal for response time does not ban independent expenditures nor does it deny independent expenditure groups access to the nation's airwaves (access that they are presently not automatically entitled to as a matter of law). The proposal does assure office-seekers the opportunity to respond—a requirement which should do much to restore a sense of balance and accountability into our political campaigns.

Again, the Court in *Red Lion* considered a parallel argument and rejected the contention that response provisions of federal communication law would "chill" the First Amendment rights of individuals. It did so in two ways. First, the Court noted that there is no evidence of such a chilling effect. The Court indicated that the possibility of any chill is "at best speculative," and that "[t]he fairness doctrine in the past has no such overall effects." 395 U.S. at 393.

Second, even if broadcasters were dissuaded from airing independent expenditure advertisements because of a response time requirement, there would still be no violation of the constitutional rights of groups wishing to make independent expenditures. Although the Supreme Court in *Buckley* v. *Valeo*, 424, U.S. 1 (1976), held that Congress could not limit the amount of money a person or group could spend independently of a candidate, the Court has never recognized a general right of access to the airways arising under the First Amendment. In *CBS* v. *DNC*, 412 U.S. 94 (1973), the Court rejected just such a proposition; thus, the fact that broadcasters may refuse to air independent expenditure advertisements does not violate the First Amendment rights of groups seeking access to the broadcast medium.

Moreover, there are compelling state interests which justify the response time proposal. It is of critical importance that there be a full and adequate response to independent ads in order to protect the integrity and accountability of the political process. The response time proposal addresses this problem in a narrowly tailored fashion.

In summary, we believe that the independent expenditure response time proposal included in S. 1310 is constitutionally sound—and is sound public policy. We urge this Committee to move forward with this important amendment to federal communication statutes.

The Personal Presentation Provision in S. 1310, Section (b)(1)

S. 1310 would also require that a federal candidate who broadcasts an ad that refers directly or indirectly to his or her opponent make that reference in person. A non-personal reference would trigger a response time provision similar to that provided for independent expenditures—if a candidate's opponent did not appear in any broadcast ad which refers to the candidate, he or she would receive, at no expense, an equal and comparable amount of broadcast time. (Section (b)(2))

As we stated at the outset, we share the concern of members of this Committee about negative advertising and its impact on the political process. We also share the concerns of many that political television advertising often maximizes style and minimizes substance in political campaigns.

Given these problems, however, there still has to be some way to differentiate, from a public policy standpoint, between the damaging impact of persistent negative television advertising by candidates and the positive value of forthright and forceful discussions by candidates of their positions and of how their positions differ from their opponents. This kind of distinction, however, does not appear to be possible to make by statute and is not made by the language of S. 1310.

In considering a statutory response time mechanism for candidates—who ultimately are responsible to the electorate—we urge the Committee to consider this inherent problem and to also examine several other risks with this proposal. First, focusing political television advertising primarily on personal candidate appearances, if this provision applies, could turn campaigns even more increasingly into "beauty contests". Those candidates who have a strong television image will benefit; others will not. While one of the goals of the proposal is to move toward constructive discussion of issues in campaign advertising, this provision could have an opposite impact. Its effect could be to disadvantage any candidate who does not have a "pretty face" and appealing television presence, even though that candidate might well be the most qualified and have positions most in tune with the constituency.

Second, we urge members of this Committee to weigh the intrusiveness of the personal appearance response provision on a candidate's ability to campaign. Common Cause generally has been reluctant to have candidates told by statute how to run their campaigns. It is clear that this candidate response time mechanism would have a profound impact on format and content of candidates' television ads.

Finally, we believe that there is a serious risk that this proposal could have the effect of favoring incumbents, who already have major advantages in certain areas under our current system, particularly in their access to campaign funds.

Challengers are usually less well-known than incumbents and often do not have any legislative record. They are generally unlikely to be able to run an effective campaign to replace an officeholder without discussing the incumbent's record. Incumbents, on the other hand, often have a large stake in ignoring their lesser-known opponents and running on the positive aspects of their own records.

The net impact of this difference is likely to be that challengers would almost always by covered by the personal appearance rule while incumbents would often avoid the response time rule and still be able to make use of all of the new television technology, ad techniques and highly produced, catchy spots without any encumbrance under this provision.

The nature of political campaigns therefore dictates that this candidate response time provision is likely to have unequal application—falling far more heavily on challengers. This provision might have the unintended effect of adding a major advantage to incumbents in an election system which is already heavily weighted in certain areas against challengers.

We urge this Committee, therefore, to examine these serious consequences in your consideration of the personal candidate appearance provisions of S. 1310.

CONCLUSION

We again want to express our appreciation to this Committee for holding these hearings and for the concern you have shown about serious problems facing the political process. We thank you for the opportunity to provide our views today and stand ready to work with the Committee on this and related matters.

The **CHAIRMAN**. Thank you, Mr. Wertheimer.

The next witness, Charles Guggenheim, is a very good personal friend of mine and of Senator Hollings. It also has made political commercials for both of us and for a number of other people.

Charles.

Mr. **GUGGENHEIM**. Thank you. It is a special privilege for me to be able to talk to you today.

Much of what is in my statement is redundant. I hesitate whether I should read it.

I disagree, let me say in the beginning, with many of the things that I have heard today.

What concerns me most are the arguments that advocate how candidates conduct their campaigns. I don't think we have an obligation to legislate boring people to death during political campaigns. I would disagree with Mr. Gans. If he really wants the number of people in the United States to vote in greater numbers, we'd better not legislate that candidates must present everything themselves on television.

We have had negative advertising in this country for over 200 years. I think Senator Packwood was right, you can go back to

George Washington. He frequently felt vilified, even though he had no electorial opposition. So it has been going on for a long time.

Eliminating negative political campaigning on television is not the area in which we should be concentrating. What has happened is that we have created a system by happenstance and or by legislation that encourages negative advertising. It encourages all of the disturbing things that you have talked about today. It encourages it because it has allowed the broadcasters to determine the political process in this country.

Who says the political process in the United States should be carried on in 30 and 60 seconds? Does this body, does the Government of the United States? The broadcasters have said that the dialog will be carried on in 30 and 60 seconds. So by abrogating the responsibility to them we have inherited a system of campaigning we all abhor. Broadcasters are not people who are looking for trouble. They are another business looking for profit, an honest profit. So why do we give them the opportunity to decide in what segments of time the public dialogue will be carried out? Why do we let the broadcasters decide whether or not the reprehensible things you have been talking about can happen?

The 30-second spot, the 60-second spot encourages the kind of thing that you have seen here today and we see in our political campaigns every year. The 30- and 60-second spot encourages the hit and run. It encourages innuendo. It encourages half truths. It also encourages a new kind of surrogate to take the place of the candidate.

Others have talked about the surrogate. The anonymity of the accuser is assured in the present process of campaigning because the political bosses of the United States, as David Halberstam said in 1972, is no longer the ones we knew in childhood, but are the media consultants. The media consultant has taken over because he has been given the authority by the candidates to create the candidate's arguments.

There are two things wrong with this. No. 1, I do not want to vote for the media consultant. And No. 2, if he does produce the material, the candidate can stand in the wings totally immune, totally protected from association with these kinds of messages. The fact that you do not insist that candidaties identify themselves with their political commercial is wrong. The present system of identification is a subterfuge.

I am surprised that no one has talked about it. I put disclaimers on my own commercials. I make them as brief and as small and as obscure as possible. Everyone does. No one in this room, probably, can tell you how long a disclaimer must run on a television commercial. Ask the stations. Some will say 4, some will say 4½ seconds. How big does it have to be? Readable, they say. What is readable. But we do not know.

I was interested to learn about the gentleman from California who interjected himself into the Illinois campaign and spent $1 million plus on behalf of defeating Senator Percy. No one in this room except one person could recall his name. This man is responsible for the scurrilous ads we just saw. But we do not know his name.

If he had been named to appear at the end of the commercial saying that he was responsible, he would never have paid for those ads. Remember he is not a criminal. He is probably a man with an average amount of integrity. He has good friends. He has made a good living. He probably thinks of himself as a good citizen of this country. He would not want his name publicly attached to those ads.

And most of you, and everyone who has run for political office, would not attach themselves to negative ads if the consequences were you would be personally identified with those ads.

So the issue you are dealing with today is not a constitutional question to my mind. What I am saying is that the rules you have established for political broadcasting have encouraged bad things. Establish new rules, no more constitutionally threatening than the rules you now have, so the system we now have can encourage a less demeaning and fairer way of doing things.

Now, the 30-second spot is an arbitrary spot. The 60-second spot is an arbitrary spot. Both time restrictions are set by the broadcasters. They encourage superficiality. They encourage innuendo. They encourages half-truths. Why do you tolerate 30 and 60 seconds in political broadcasting? Why do you abrogate the responsibility of setting those time restrictions to the broadcasters of this country? What right do you have to give that arbitrary decision to a government-protected monopoly?

The political dialog has to be lengthened, it has to be broadened. The British—and I have been in two British elections—have rules that are established by a government-selected nonpartisan committee of citizens. Before every election they decide how long the political advancements will be. Without exception they perscribe prime time. Incidentally, do not ask the broadcasters in this country for prime time for political advancements. They will not give it to you. You must struggle with them to get prime time. You must struggle with them to get 5 minutes. They do not give you half hours at all anymore in prime time for political broadcasts in statewide elections.

So the present system has encouraged these problems. It is time for this body, it is time for this government, to set rules that are presently set by the commercial broadcasters.

The constitutional issue of course, is overriding and there are better minds than mine that can address themselves to it. But let me say this. I do not think it is the constitutional right of a candidate—rather, I do not think it is a constitutional right for someone to be an unidentified surrogate for a political candidate and expect to enjoy the rights of the first amendment. The candidate's rights should be protected. He should be able to say anything he wants. He should make any charges he wants. But he does not have the right to say anything he wants if he is unwilling to identify himself.

No commercial should go on the air without us knowing who put it on, who is responsible, and whose integrity and character is on the line. Let's not attempt to purify the system. Let's take the ground rules out of the hands of an industry and put them into hands that better serve the American people.

[The statement follows:]

STATEMENT OF CHARLES GUGGENHEIM

Mr. Chairman, I made my first political television commercial thirty years ago. I was too young and unwise at the time to know that I was helping to launch a profession that would, within fifteen years, demand more than one out of every two dollars spent on political campaigns and profoundly change the political process in America.

Acting as a media consultant and producer I have been involved in over 100 elections—representing men and women running for the statehouse, the Senate and the Presidency. After thirty years of observing this process I have become increasingly disturbed that the rules we have established for paid broadcasting demeans the political process.

Today, in politics visual and audible manipulation abounds. Every tool of the advertising craft has been exercised to prove opponents lazy, dishonest, unpatriotic, dumb, cruel, unfeeling, unfaithful and even criminal. In the past ten years there has been an epidemic of negative political advertising. It takes so little skill to condemn on radio and television commercials that there has been a proliferation of media consultants—many of them carrying their wares from one state to another. Only the names on the commercials need to be changed.

I do not disparage everything that has taken place since the advent of paid television in politics. During the past thirty years there have been some fine moments. Paid political announcements have made it possible for a new breed of vigorous, independent candidates to enter public life despite discouragement from entrenched political factions and the press. The smoke-filled room has all but disappeared as paid television replaced it as the forum for political choice. Party bosses have been moved to the back seat in politics. Handpicked candidates have become an endangered species. The sins of McCarthyism, Watergate and Vietnam have far less chance of returning knowing they face trial in the living rooms of America.

David Halberstam write in 1972 that the political media advisors of this land have become America's new political bosses. My concern is not that we have replaced one group of influence makers with another, but that in making this historical change we have brought about and encouraged a system of political campaigning that is eroding the dignity of the election process.

Everyone on this committee, anyone who has ever run for a major political office, is familiar with what I'm talking about. Up to 70% of what Americans hear and see in a political campaign today comes via 30 and 60 second paid political announcements. In 1984 candidates paid the broadcast industry over $300 million dollars for the privilege of discussing the issues in 60 seconds or less.

It is no wonder our political campaigns have become negative and hostile. No wonder our electorate has become more cynical about government and the people who run for political office.

In my mind the 30 and 60 second commercials are one of the major reasons for the problem. Ask any seasoned media advisor and he will tell you what he can do best given 30 seconds. Create doubt. Build fear. Exploit anxiety. Hit and run. That's what can be done best in 30 seconds. The 30 and 60 second commercials are ready made for the innuendo and half truth. They forgive the obligation to qualify, to explain, or to defend.

The proliferation of television spots is one of the reasons our campaigns are becoming negative and mean.

The other reason is the use of anonymous surrogates to deliver negative advertising. Candidates themselves do not produce commercials. Candidates leave that task to their hired media directors who are free to craft and hone their 30 second inquisitions in the remote darkness of Madison Avenue editing rooms.

Having surrogates represent office seekers has been happening in this country for two hundered years. Abraham Lincoln never left Springfield during the Presidential campaign of 1860. Others did his campaigning for him. But today's surrogates are quite different. Faceless, they craft their messages in anonymity, delivering their accusations via actors, music, special effects and photography—all without fear of personal accountability either to themselves or to the candidates who hire them.

Strip away the anonymity of negative political advertising. Put the face and voice of the accuser on the screen and you will move in the direction of decency for the American political process overnight.

Insist, also, that paid political announcements be no less than two minutes in length and you will see a dramatic change in the tone of the political dialogue in this country.

Political campaigning in America has never been free of rancor and unfairness. Everyone in politics from George Washington to present officeholders has suffered from it. We should not attempt to purify the system nor should we interfere in the public dialogue. But government has an obligation to establish processes that do not encourage the demeaning of the political process. The system we now have in place encourages that demeaning.

I have participated in two British elections. The commercial broadcasters there do not make the rules—a forum of British citizens does. In the particular elections in which I took part, paid political broadcasts were confined to ten minutes in length. Stations were required to provide prime time—free. No advocacy broadcasts could begin prior to three weeks before the election.

I am not advocating we adopt the British system, I think in some ways it is too restrictive to our needs. But I went away from that experience feeling that we have a lot to learn from it. The rules in Britain allow room for substance, give range to criticism, discourage unfairness. Equally important, the British provide something American broadcasters seldom if ever do—prime time for programs exceeding 60 seconds.

I realize there are many complications, perhaps risks, surrounding suggestions for reforming the present system. The First Amendment is a precious document and it should not be tinkered with. But I would advocate that we have already placed arbitrary restrictions on self expression in this country by allowing the broadcast industry to set ground rules that frequently stifle substance and encourage specious attacks.

I believe the First Amendment was intended to protect individual who wished to speak for themselves—not individuals who hire others to hide in the wings and speak for them.

By accepting the status quo government has not avoided interference in the democratic process. It has merely advocated its responsibility to happenstance and to an arbitrary system that presently brings little distinction to the political process and the American people. Thank you.

The **CHAIRMAN**. Excellent testimony from all three of you. Thank you very much.

Senator **HOLLINGS**. I want to congratulate Charles. You made a magnificent statement. But I want to congratulate you, you spoke to the camera the entire time. Very good job. Excellent.

The **CHAIRMAN**. Fritz Hollings, I never realized you were such a good media consultant.

Senator **HOLLINGS**. I have been trained under Charles.

The **CHAIRMAN**. I want to give you a hypothetical on the question of interlopers participating in a campaign. Let us suppose an individual who is very, very wealthy and who decides that rather than take over a business corporation or a newspaper or something else, this individual wants to take over the U.S. Senate. Let us suppose that this individual has $25 million, $30 million to spend. It is not unthinkable, because in these corporate takeovers there are some very wealthy people who are involved in just that kind of enterprise.

Let us suppose the person sets up something that is called an independent committee, gives it a high sounding name and spends $25 million to $30 million in, say, 10 Senate races in 1986, an average of $3 million in each Senate race, and goes on in the last 3 or 4 weeks of the campaign with negative commercials against one of the candidates.

Is there a likelihood or a strong possibility that that one individual would have so much power as to change the makeup of the U.S. Senate?

Mr. **WERTHEIMER**. Well, Senator, I think sooner or later something like what you have just described is going to happen. It may happen first in a Presidential election, but it is going to happen. That is why we feel it is so important to provide some balance to this.

There is a set of rules that exist for the candidates and the parties. People have different degrees of views about that, about what is right and wrong. There is a set of rules, and we do need rules in terms of regulating the role that money plays because of its potential impact.

But once the set of rules applies to the players in the arena and someone else is on the outside that can totally unbalance that set of rules, you have a very dangerous situation on your hands, and you are going to see something like you described happen, and it is very important to have some balance in this system so that a candidate of whatever party who is hit by it has a way of dealing with it.

The CHAIRMAN. Ms. Ridings.

Ms. RIDINGS. I think it is perfectly possible that something like what you described could happen. I would like to just amplify a little bit, though, if I might. I am just back a few weeks from a trip to four South American countries, two of which have, I will say, newly formed democracies, and in one of them they are going to be heading into a political candidate kind of context without ever having had television used in a nationwide campaign before. I discussed some of these kinds of issues with people I was meeting with in those countries, and it was almost like another world. It was totally beyond their comprehension that we could have allowed ourselves in this country to come to this kind of a situation. It was almost—I do not think they would have believed me had I not insisted that this was exactly the way things happen here, and I think hopefully maybe provided some food for thought for a nation that is far behind in the development of its communications technology, and thankfully in this context of its political campaigning by television.

But I think you have raised a spectre that is pretty scary for us, that is probably all too possible and one that I think in the context in which you phrased it is one that we ought to give more thought to as we address the particular, negative advertising being only one of them, of course.

The CHAIRMAN. Mr. Guggenheim.

Mr. GUGGENHEIM. I am more sanguine about it. I think there is an element in elections which we have not talked about. We assume that paid political advertising is everything we see in an election. It is not. The free press is there. There is, from time to time, a balance.

I can give you a formula, as to when paid television works and when it does not. Frankly, I think more candidates pay to defeat themselves than to win. So, negative advertising does not always work. I think we have to stop talking about how we are going to control the system so that righteousness always prevails. I do not think that is what is needed. What is needed is an opportunity for all views to be placed before us, fairly. If a group, the hypothetical group you mentioned came forward, the Nation's press would be on that group every day. I hope they would. And I think balances would take place.

What happens is that negative campaigns work best when they are put into place very late, when they can reach the suspicions and anxieties of an electorate without their negative aspects being attributed to anyone.

I think anything as large and as great as you propose hypothetically would not work. I have more faith in the checks and balances than many people in this room.

The Chairman. Let me ask just one informational question, if I could. In other democracies—Great Britain is one—is it true that they do not allow candidates to buy TV time?

Mr. Guggenheim. There are no candidates. There are just political parties. No candidate can buy time on British television.

The Chairman. What I am getting at is in other democratic countries they do conduct vigorous political elections without candidates buying their own TV time, is that not correct?

Mr. Wertheimer. Yes. I think the candidates do run in Great Britain, although the party controls television, but candidates have very low limits on what they can spend, but they can spend money.

I just want to make the following——

The Chairman. I think that is the general rule in Europe. I may be wrong, but I believe it is the general rule in Europe that political candidates cannot run their own TV time.

Mr. Guggenheim. It is complicated by the parliamentary system. No one runs for Prime Minister. The party decides who will be the Prime Minister.

The Chairman. But people run for Parliament.

Mr. Guggenheim. They run for Parliament, you are right. The parties decide on what time, and the stations are only obligated to give the parties time, not the candidates.

The Chairman. You do not have Joe Bloke running for the House of Commons, buying his own TV time.

Mr. Guggenheim. No.

Mr. Wertheimer. Mr. Chairman, if I could just address one point that Mr. Guggenheim made when he said it was unlikely that that kind of independent campaign would be negative, the issue here is not just negativism, it is allocation of resources in a campaign process. Everyone in this business tries to raise as much money as they can. It is kind of considered a natural act. A very, very big disproportion in terms of resource allocation is bound to have an impact on the process, and I think is a legitimate question to be concerned about in the political process, and certainly in the case of independent expenditures where you are dealing with people who are in effect unaccountable.

Ms. Ridings. I also just want to interject one other point. When we were talking about—your original question was about taking control of the Senate, and we have talked about whether a candidate would win or lose as an outgrowth of negative campaigning. There is another element here that is, it seems to me, so important that it is obvious, but it needs to be restated, not just the impact on the candidate who wins or who loses, but its impact on the entire electoral process, the entire political system.

You know, we talk about why voters are turned off, and we can have those debates, and you all talked to Curt Gans about that, and it is certainly a complicated question, but do you all wonder sometimes why politicians keep dropping in public esteem in the polls? This kind of thing throws a real wet blanket, on the whole integrity and spirit, it seems to me, of the democratic process in this country, and that is one thing that really does turn folks off, maybe not just in terms of one candidate versus another, but the whole business of politics.

You know, we in this room, we are all kind of political junkies, everyone in this room, but it has been shown time and time again that most citizens are not all that caught up in politics. They celebrate some of the trappings of politics, but if they get interested at all, it is interest in Government, exactly what Government does, not what politics does.

Mr. GUGGENHEIM. You see, they can disparage the process, and you are right, they do disparage the process because they do not have to disparage themselves at the same time. You have allowed them to separate themselves from the disparagement of themselves. You should not allow candidates to do that.

I have been in campaigns with terrible commercials against me, I mean, just awful, worse than have been exhibited in this room. I mean, these were just humorous today. They were not even well done. But I have seen commercials that were terribly well done and extremely vitriolic. The candidates that put them on the air, who were responsible for putting them on the air, they were not bad people. But I will tell you, if they knew their face and name was going on their commercial, they would not disparage the political process.

The CHAIRMAN. Senator Hollings.

Senator HOLLINGS. Let me say that all three statements have been superb, and once again, Mr. Guggenheim, yours is a brilliant statement, as I see it, and I say that genuinely.

Let me ask you, how do we get in, since you in my view hit the meat of the coconut about that 30-second advertisement? That was the one thing I had to learn in the Presidential race, to talk in 20-second segments, if I had any chance at all of getting on the news, when I was trying to break out of the pack, I knew the media was not going to take a general statement and try to get the highlights, but rather, I had to talk in 20-second bites.

We have had the networks come before this committee over the years, over the 19 years I have been here and said that the 1934 Communications Act has no control over us whatsoever, we are not under it, we are not governed by it. We had one little exception the other day when Mr. Wyman thought that it ought to be used to protect the board of directors of CBS. That is the only aberration I have found since I have been here in 19 years.

So if we cannot license them or fix the responsibility, you say the Congress has been derelict in allowing this to happen. I cannot get even a license. I am having a hard time getting a fee. They have the prime time. How do I get at that 30-second allocation, and how do I get at that prime time allocation if I cannot even license them? You have been in the game a long time. I think you put your finger right on the bulls-eye, right on the problem itself, but how do I do that?

I have been trying. You tell me how to grab them, I will get them. I think we can get the votes to do it, but I have not been able to fix any responsibility along that line, and Ms. Ridings, you are dead right, this has permeated us as Senators, not just the campaigning. We are not the most deliberative body. There is nobody here listening, they do not have time. I cannot hear Senators, Senators cannot hear me. We are up here, and we are on TV now, and we will run from here to another thing. We will put out our little statements in the morning. It is a farcical appearance on the floor of the Senate. The whole routine of the U.S. Senate is not to have a deliberative body but to have the hit and run that you are talking about in campaigning, to have the hit and run in public service itself.

That is what diminishes me around here. I could learn from my fellow Senators and make a better judgment perhaps, but I do not have that opportunity because the staffs are running us. It is all the media, it is all the 20-second bite, and it is off and running. It is hit-and-run kind of service, and off again.

Now, having said that, Mr. Guggenheim, how do I control the networks to get into that prime time, that political campaign for one, and try to extend it for another to more than the 30-second format?

Mr. Guggenheim. I am probably the last person in this room who should answer that because I do not understand, exactly how all of this works, but you have given, through the Federal Communications Commission, as I understand it, certain regulations with which they guide industry in this country. I understand it is very difficult to change that. I understand this body has a very difficult time coming to terms with changing the Broadcast Act. I assume that is where part of the problem lies.

I think the broadcast industry is very, very sensitive to what you are saying here today. They do not like interference. I can understand why they do not. I think that they should very well be, if not—if they cannot be legally pressured which I understand would be very difficult to do because of the influence they have in this government, to make those broadcasting changes, I think they should come together and counsel with you on this. They do lose money by extending the 30 seconds and 60 seconds to 2 minutes. That is why they will not sell 2 minutes.

Even if I had you as a candidate, or Senator Danforth as a candidate and I wanted you to say something substantive, I could not buy the time to make it substantive. They will not give it to me.

I think they have to be made to understand that if they don't make changes they are going to put themselves in jeopardy. They are going to lose revenue. There is no doubt about it. But why should they not sacrifice revenue when you protect them? As someone said, maybe facetiously, you have given them a license to print money. They owe the system something.

Senator Hollings. Mr. Wertheimer, the PAC's have gotten out of hand.

How better can we get a handle on that?

Mr. Wertheimer. Well, we think you can get a handle on it. The Presidential system is one way of dealing with it.

If you look at the amount of PAC money in the Presidential election in 1984, it was a couple of million dollars. If you look at the number of PAC contributions in Congress, it was over $100 million. There are a couple of elements. There has to be a way for candidates to run. Therefore, there have to be incentives for contributions, in our view, whether it is the Presidential system or a variation of it, and there needs to be limits on the amount that a candidate can accept from all PAC's. There are ways of doing it if the will is there.

My own view is we have reached a point where the PAC system, as damaging as it is to the country, it is that bad for people who serve in Congress. It makes it impossible to have the public buy in to this being a fair process, and as someone who has not only lobbied here for 15 years but worked up here for 4 years, I think it is doing terrible, terrible damage to the institution in a way that you all pay as heavy a price as anyone else.

Senator HOLLINGS. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Pressler.

Senator PRESSLER. I recall something Mr. Guggenheim said. He pointed out that it is tough to buy into prime time or get into prime time. Of course, in the Presidential campaigns that is not true, but in most senatorial or congressional ones, it seems to be true. I noted that a lot of TV stations that used to give a half hour of time do not do it anymore. Maybe that is a result of deregulation or some other factor. I have noted that a lot of radio stations that used to give 5 minutes or 10 minutes of their prime time do not do it anymore. And I have noticed that a lot of cable systems that once said they were going to run public affairs shows have cut them way back, and certainly includes Congressmen's and Senators' reports.

What is going on? Why is that? Is that deregulation?

Mr. GUGGENHEIM. I do not think it is deregulation as much as two other factors. First of all, the thing to understand is the broadcasters are a commercial enterprise. You cannot profitably ask anyone in the commercial field to do things which are not profitable.

They assume that a 5-minute political commercial will not be very interesting. Not because it is your campaign, but generally political pilgrims are not considered very interesting. They lose ratings. Ratings do go down.

Senatorial candidates are also around only once every 6 years. And whatever favors stations do for the advertising agency that represents you, you are considered a client that is here today and gone tomorrow. They are reluctant to substitute a 12-month client for a 2-month client.

So there are really two reasons they do not want to sell you that 5 minutes. Also you have opponents, and that means if they sell time to you, they must give it to your opponent. Before they know it, they have sold two 5 minutes. It is not easy time for them to pluck out of the system. The system is set up for 60 seconds and 30 seconds. It disturbs the system. It means they have to take 5 minutes of Johnny Carson off the air after the late news and insert you, and that does not please them very much.

Senator PRESSLER. But what is the solution to that?

Mr. GUGGENHEIM. Well, I guess it gets into the whole area that Senator Hollings mentioned. What kind of control do you have or can you have over the political broadcasting system in terms of setting periods of time? I mean, it is very easy for me to theoretically say that the system is unjust and wrong. It is another thing for me to say it is very easy to change because I do not understand what the difficulties are, what legislative forest you have to struggle through to make things happen.

We can criticize the broadcasters, and I do because I had to fight with them for 30 years to give me time, time I thought was very necessary for my candidates. But on the other hand, I think they have to be told that there are ground rules here that are not fair. Why do you go to a station and ask for them to give up their ratings when you do not go to another station and ask the same thing? They are in competition. So I think the rules have to come from a third party or it will not work.

Senator PRESSLER. So, in other words, you might suggest an amendment to this bill that would make such a requirement?

Mr. GUGGENHEIM. I would like to see that, with one caveat. I want to be very sensitive to the constitutional problems.

Senator PRESSLER. I have been concerned about this because maybe some candidates are tempted to use negative or attention getting ads when they cannot buy into prime time to reach certain audiences. Even when they have the money. It has really become a problem for congressional and some senatorial candidates. I do not think it is a problem in the presidential arena.

We might consider a possible legislative remedy.

Mr. GUGGENHEIM. I have just put this through my mind in the last week. I think that political campaign advertising—and I will be rather radical here—should not be less than 2 minutes. I do not believe that political dialog should be given in less than 2 minutes.

Senator PRESSLER. Can there be a provision that a certain amount of prime time be available? How would you define that?

Mr. GUGGENHEIM. Yes. I think that less than half the stations I have approached in major markets would give me 5 minutes at all.

Senator PRESSLER. You would never get a 2- or 5- minute prime time spot?

Mr. GUGGENHEIM. No.

Senator PRESSLER. So 30 seconds is the only thing you can buy?

Mr. GUGGENHEIM. That is right.

Senator PRESSLER. So it would take some companion legislation or an amendment to require that broadcasters make it available.

Of course, a candidate would still want to buy on the most popular station, which would drag their ratings down, and they might not want to buy on the less popular stations.

Mr. GUGGENHEIM. Exactly.

Senator PRESSLER. It is awfully hard to craft fair legislation.

Mr. GUGGENHEIM. Yes, it is.

Senator PRESSLER. Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank each of you for really remarkable testimony. We very much appreciate it, and we thank you for your patience.

The next witnesses are Newton Minow and Ben Heineman, members of the law firm of Sidley and Austin.

I want to thank Mr. Minow and Mr. Heineman for their help to Senator Hollings and me in putting together a bill and trying to work our way through some of the legal problems, some of the constitutional issues that exist any time that the question of advertising or speech or political campaigns comes up, and for all of the time and effort that both of you and your partners have put into this effort. I know for two people of your caliber. That time is money, and you are very nice to wait here this morning to testify.

Mr. Minow, you have a plane to catch or another appointment to make. If you have to leave before the testimony is over, please do so.

STATEMENTS OF NEWTON N. MINOW: AND BEN W. HEINEMAN, JR., COUNSELS, LAW FIRM OF SIDLEY AND AUSTIN

Mr. MINOW. Mr. Chairman, Senator Hollings, Senator Pressler, thank you very much. We will submit our statements for the record because I think we can be more helpful in answering your questions.

About your comments Mr. Chairman, I have just come back from China. You will be interested to know there are signs in China now that say "time is money," which is quite a switch.

I was taken, Mr. Chairman, with what Senator Hollings said earlier today. As an old timer who has been before this committee many times, I think what you are dealing with today reminds me of what Robert Hutchins once said. He said most of us spend our time on the urgent rather than the important, and I think life in the Senate very often is spending time on the urgent rather than the important. But today you are dealing with something that is very important because it goes to the root of the democratic process.

I think it would be useful to take two examples to give a sense of history to understand how we got to the issue we are talking about today.

When I was Chairman of the FCC in the early 1960's, there was no statutory right of access for political candidates to the media. It did not exist. I remember very clearly that we had a case in Mississippi where a candidate was running for Congress, a black candidate, a minister, who had gone to the television station there and could not buy time. He complained to the FCC. He said, I do not want anything for nothing. I have a check. I went to the station. They told me to come back next week. The following week they told me to come back next week. The following week they told me to come back next week. He said, the election is next Tuesday and I cannot buy time.

We looked into it, and sure enough, under the law at that time a candidate did not have a right of access to radio or television, and it turned out that I testified in the Congress about that problem. The opponent was John Bell Williams, a member of the House committee that dealt with the FCC. He did not want to buy any time, and the station said, well, we are treating both candidates alike because neither of them are going to go on the air.

We sent a telegram to the station and asked how does it appear to you to be in the public interest to have no political discussion on the air? They put him on.

I came to the Congress, presented that problem and I suggested that something ought to be done about this because the law is really not very clear.

Similarly, in the State of Ohio, an incumbent, who was Senator Lautshe, who served on this committee, was running for re-election. He was way ahead. His opponent wanted to get him to debate. Senator Lautshe wisely said no, he did not want to debate. So the opponent put together a commercial in which he debated with an empty chair, and the empty chair carried a sign with Senator Lautshe's name on it. He went to the television and he said he wanted to buy time, and the station said no, we are not going to put you on with that commercial. It came to the FCC late Friday afternoon. The election was the following Tuesday. We had to act. We took a vote. One commissioner was missing. At that time there were seven commissioners. We voted three to three, Republicans and Democrats on both sides of the issues.

We came to this committee at that time. I asked, have we got a problem here, Members of Congress, Senators? Do you want a right of access for political candidates or do you want the broadcasters to decide whether a candidate got on or did not get on?

Similarly, in the late 1960's I headed a bipartisan commission dealing with this, came before this committee, and at that time we were dealing with many of the same issues we are talking about today. Out of that came the amendments to the law that eventually established what is now the right of access for political candidates to buy time, and also to buy it at the lowest unit rate. That is how that happened.

Now, looking back at it, we made a big mistake, all of us, because in spelling out the right of access, we should have also done what you are trying to do here today. We should have insisted on a very clear identification of the candidate with the commercial. It has nothing to do with whether the commercial is positive or negative; it is simply to say to the voter, to the viewer, here is the man or the woman who is responsible for that. Here is the person who is behind that commercial. We should have required a disclosure and accountability, as Charlie Guggenheim said, to avoid the hit and run business of the unknown person behind the commercial. We should have required, and we should have required it in the language of the medium. We should have required that the person's voice and picture be there so that in 4 seconds you could not have a fleeting little glimpse that you could not read that said this is paid for by the candidate *x* committee.

Now, that is in my view long overdue, and should have been done a long time ago. It would have avoided a lot of these problems. But I regard that as the essence of what the bill that you are proposing would do today, at least as to part A.

I know there are a lot of other problems. I have worked with many of the prior witnesses who appeared here today. I agree with many of their views on broader reform as well. But it reminds me of the old story about the mosquito that flew into the nudist camp and had a nervous breakdown. He said I do not know where to begin. There are so many things that you would like to do with this system to improve it, but what you have got here is a beginning, and it is a beginning which would provide accountability, disclosure so that the voters, the viewers would know who was behind the commercials.

And I think, as I say, that is long overdue.

BEST [illegible]

I think it is confusing, and it gets off the point to talk about negative ads because—who can decide what is a negative ad? And I do not think we want the Government in the business of deciding what is a negative ad, nor do we want the broadcaster in the business of deciding what is a negative ad and second guessing the candidate. The point is to have a name and a picture and a voice of the person responsible for the ad so the viewer will know what it is.

Now, that is part A. On part B, I live in Illinois, and I lived through the anti-Percy commercials, and I anguished over them; even though I am a Democrat, I was ashamed to see that such tactics were used against Senator Percy whom I admire. It was an outrage. It was pointed out that we do not even know the name of the man who was responsible. And I think that if we require that of a broadcaster, who was under no statutory obligation to accept such an ad, if he chooses to broadcast a noncandidate sponsored ad, then he has got to provide time to the other side.

What could be fairer than that? What could be more in the interest of the viewer and the voter than that, than to hear both sides? I cannot understand why there would even be an argument about that.

But in any event, it seems to me what you have done is to provide an excellent beginning. The law—I brought my own lawyer with me today, my partner Ben Heineman, who is a constitutional scholar who can deal with the constitutional issues. I was a law clerk at the Supreme Court in the early 1950's, and I took away with me permanently some words in an opinion of Justice Jackson at that time when he said the Constitution of the United States is not a suicide pact.

And I do not believe that the Constitution of the United States stands in the way of insisting that voters know who is sponsoring political commercials, who is behind them, and insisting that voters be well informed in exercising their precious right to vote.

And I think that is what this is all about.

With that, Ben, if you would like to say a word, and then we might answer questions.

[The statement follows:]

STATEMENT OF NEWTON N. MINOW

My name is Newton N. Minow. With me is Benjamin W. Heineman, Jr. Both of us are with the law firm of Sidley & Austin. I am here today to discuss serious problems arising from the use of broadcast media in political elections, and the ability of the proposed Clean Campaign Act of 1985 to remedy those problems. Ben will discuss some of the constitutional issues surrounding adoption of the Act. We thank you for your invitation to appear before you today and, with your approval, would like to make our written statements a part of the record.

More than fourteen years ago, I testified before this Committee as Co-Chairman of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era.[1] The concern of the Committee at that time was the then growing use of 10 to 30-second political "spot" advertisements. It was recognized then, as now, that the use of such advertisements contribute little or nothing to the reasoned discussion of candidates' policies or positions on issues. Instead, use of such spots serve only to turn campaigns into little more than beauty contests.[2] While such ads often provide heat, they rarely provide light.

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[1] Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce on S. 1, S. 382 and S. 956, 92d Cong., 1st Sess., 398-406 (1971) (testimony of Newton Minow).

The growing use of spots was found to be directly related to the growing cost of campaigns, which, in turn, was caused by the increasing use of television in elections. It was, in part, to address this problem that the Congress later passed amendments to Sections 312 and 315(b) of the Communications Act, which now grant to legally qualified candidates for federal elective office statutory rights to reasonable access on the broadcast media, at the lowest unit charge of the relevant stations.[3]

As the members of this Committee well know, campaigns these days are directed primarily to the media. The candidates realize that more voters may see and hear them in one 30-second spot than will see and hear them in person during the entire campaign period. Campaign appearances are now timed to meet the network's and local station's news deadlines. States are broken up by campaign staffs not into population or demographic areas, but into media markets. In short, as stated by the Supreme Court, voters have placed increasing reliance upon television and radio for news and information, which has made these expensive modes of communication "indispensible instruments of effective political speech." [4]

In addition, non-candidate groups are becoming greater and greater users of the broadcast media in their efforts to obtain the election or defeat of specific candidates. It has even been said that political action committees have replaced the more traditional political parties in terms of their influence on political elections.[5]

Here are some numbers that underline the magnitude of these developments:

In 1978, the total cost of the House and Senate general elections was approximately $158 million; by 1982, over $300 million was spent on the elections, an increase of almost 200%.[6] The 1985 election cost figures are not yet finally computed, but the FEC's Interim Reports leave little doubt that this trend of escalating costs has continued.[7]

The use of television was a principal cause of this skyrocketing expense. For example, of the $29 million in public funds allocated to Ronald Reagan's and Jimmy Carter's campaigns in 1980, almost one-half was spent on "paid media," primarily television.[8] The three largest conservative PACs alone appear to have spent over a million dollars on television advertising in the 1984 election period [9] with NCPAC itself producing 20 commercials for the Presidential campaign.[10]

This continued, dramatic use of television and radio in campaigns has raised similar, if not greater, threats to rational decision-making in elections today than were confronted by this Committee fourteen years ago. Initially, it must be recognized that we have, with the passage of these years, become even more sophisticated in the use of television in politics and political elections. Not only do spot advertisements continue to be the mainstay of political advertising, but today, it is ofter impossible for viewers and listeners to appreciate whether an advertisment was authorized, supported, or even disclaimed by the candidate. Many times, in fact, voters are affirmatively mislead as to the sponsorship of various political advertisements because of the ambiguous names of sponsoring organizations.

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[2] *See generally* Diamond and Bates, *The Spot, The Rise Of Political Advertising on Television* (1984).

[3] 47 U.S.C. §§ 312(a)(7), 315(b).

[4] *EEC* v. *NCPAC*, 470 U.S. , , 84 L. Ed. 2d 455, 468 (1985), *quoting Buckley* v. *Valeo*, 424 U.S. 1, 19 (1976).

[5] Note, "Political Broadcasting by Independent Committees," 64 Bost. L. Rev. 625, 626 n.4 (1984). In 1972, there were 113 political action committees ("PACs") registered with the Federal Elections Commission. Note, "Curbing Injurious PAC Support Through 2 U.S.C. § 441d," 35 Hastings L. J. 869, 871 n.5 (1984) (citations omitted). By 1982, this number had grown to 3149, *id.* at 872, and by 1984, it appears that over 4300 PACs were registered and attempting to influence the outcome of federal elections. 1983-84 FEC Reports on Financial Activity, Interim Report No. 10, Summary Tables, at 78 (hereinafter referred to as "1984 RFA").

[6] "PAC Contributions Make A Bigger Impact," *National Journal*, Sept. 29, 1984, at 1836. Contribution by PACs to House and Senate primary and general campaigns increased by about 250% during this time, from $34.1 million in 1978 to $83.6 million in 1982-1983. *id.*

[7] *See* 1984 RFA, *supra* note 5.

[8] Diamond and Bates, *The Spot, supra* note 2, at xii.

[9] Brownstein, "On Paper, Conservative PACs Were Tigers in 1984—But Look Again," *National Journal*, June 29, 1985, at 1504, 1506.

[10] *Id.* at 1507. Not only is television increasingly relied upon during elections, but increasing reliance also is being placed upon negative advertisements. For example, in 1980, 14% of all money spent on federal elections were spent on negative ads. Note, "Curbing Injurious PAC Support," *supra* note 5 at 873. When taking into account Presidential election expenditures, twice as much money was spent by the PACs in 1980 on negative ads then was spent by them on positive ads. Leatherberry, "Rethinking Regulation of Independent Expenditures by PACs," 35 Case W.L. Rev. 13, 14 (1984). In 1982, almost four times as much was spent by PACs on negative ads than was spent by them on positive ads. *Id.*

In addition, as indicated above, non-candidate groups are now a, if not the, significant source of political broadcasts advocating the election or defeat of candidates. The regulations that govern political broadcasts, however, have not been revised to address this relatively recent phenomenon. Unlike the political editorials presented by broadcast licensees themselves, for example, similar broadcasts sponsored by non-licensees are not subject to reply-time requirements. The result of this failure of the law to keep abreast of developments in the use of the broadcast media is that, many times, voters are left uninformed, or are presented with only one side, of the issue surrounding campaigns.

The Supreme Court has recognized, and sound public policy dictates, that the public has the right to know who is attempting to convince it to vote in certain ways,[11] and has the right to receive a balanced presentation of issues raised in political editorials.[12] As Chairman Danforth has stated, "a well-educated, well-informed public is the foundation upon which America's democracy is built." The broadcast of unattributable and unanswered political advertisements hurts all candidates seeking the same office, and undermines the entire electoral process. A candidate who is attacked in a broadcast by other than a licensee, for example, is injured because he normally does not have the right to reply to the attack under present law. Even the opposing candidates who are not the subject of the attack also can be injured, however, due to the confusion of the voters regarding the connection between those candidates and the advertisement. Notwithstanding the sponsorship identification requirements set forth in present law,[13] candidates often are held responsible for attacks on their opponents, even when they had no connection with the attack.[14] For example, when NCPAC undertook a virulent attack on Senator Sarbanes, many observers believe that a backlash of voter's opionions regarding the attack significantly and adversely affected Larry Hogan's election chances, even though he disclaimed any connection whatsoever with the advertisement. Similarly, in Illinois in 1984, we saw an out-of-town citizen from California spend approximately one million dollars viciously attacking Senator Percy, even though Paul Simon did not want or authorize such efforts.

The use of unattributable and one-sided political advertisements also has a dramatic and adverse affect on the electoral process as a whole. When such advertisements are used to the extent that they are today, voters become cynical and apathetic about all candidates and elections. The inevitable result is lower voter turnouts and negative reactions towards politicians. The men I worked for, Gov. Adlai Stevenson and President John Kennedy, taught me that politics should be an honorable profession. These teachers are not around to teach this lesson to the young today. Our democratic process is now at risk if the voters do not receive a balanced presentation of issues, or do not see and hear their candidates, but see and hear only fleeting images created by others.

The Clean Campaign Act of 1985, presently being considered by the Committee, makes significant progress, I believe, in addressing these problems. First, with regard to the ability of voters to appreciate the true source of political advertisements by candidates, and to make candidates accountable for their advertisements, the Act provides that if a candidate seeks to exercise its statutory right to "reasonable access" to broadcast an advertisement that "refers" to the candidate's opponents, that reference must be made by the sponsoring candidate in person. It is important to note that the Act does not prohibit political advertisements by candidates or others that do not conform to the "personal appearance" requirement, even when they refer to opponents of the sponsoring candidates. All the Act would do is to limit a candidate's statutory right to successfully demand access to make such references, so as to be applicable only to those instances where the candidate personally appears in the advertisement. Candidates still would have the right to broadcast advertisements that do not refer to their opponents, and broadcast licensees would still be free to accept and air candidate-sponsored advertisements that refer to the candidate's opponents while not complying with the personal appearance requirement. If they choose to do so, however, the candidate who was "referred" to in the advertisement must be given free time to reply to the reference.[15]

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[11] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791-792 (1978).

[12] *FCC* v. *League of Women Voters of California*, U.S. , , 104 S. Ct. 3106, 3117 (1984); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

[13] Section 317 of the Communications Act of 1934, as amended, and FCC Rules, provide, in part that any broadcast time that is paid for or sponsored by a particular person or group must be accompanied by an announcement to that effect. 47 U.S.C. § 317; 47 C.F.R. § 73.1212. The Federal Elections Campaign Act, as amended, and the FEC Rules provide, in part, that broadcast communications which expressly advocate either the election or defeat of a "clearly identified" candidate must announce that the broadcast was authorized by a particular candidate or not authorized by any candidate. 2 U.S.C. § 441d; 11 C.F.R. § 110.11.

[14] An opposite, but similar, phenonmenon is indicated in statistical studies that establish that political commercials sponsored other than by candidates or their committees are more effective, and perceived as more trustworthy, than candidate-sponsored advertisements. See Garramone and Smith, "Reactions to Political Advertising: Clarifying Sponsors Effects," 61 *Journalism Quarterly* 771 (Winter, 1984). An incentive sometimes exists, therefore, not only for an unauthorized group to appear to be authorized by the candidate, but for a candidate-connected group to appear to be independent.

Second, with regard to modernizing a candidate's right to reply to political advertisements sponsored by non-candidates and which either oppose the candidate's election or advocate the election of the candidate's opponents, the Act simply would extend the FCC's present Political Editorial Rule, which grants free time to candidates to reply to similar political broadcasts by licensees.[16] The same rationale that led the Commission to adopt, and the Supreme Court to affirm,[17] the FCC's Political Editorial Rule—the public's right to have both sides of important issues, including the discussion of a candidate's qualifications, presented over the broadcast media—also underlies the Act's provisions. In addition, the provision of time to candidates to reply to these political advertisements by non-candidates assures that the public will be informed of the actual sponsor of the advertisements.

In short, the use of deceptive and unattributable spot advertising contributes little or nothing to reasoned decision-making by voters, yet undermines the entire electoral process. The presentation of one-sided political advertising which advocates certain viewpoints on candidates' qualifications without broadcasting contrasting viewpoints violates the public's right to a balanced presentation of issues on the broadcast media, and often leaves voters uninformed or misinformed about the qualifications of candidates. This poses an unacceptable risk to the democratic electoral process. It is for these and other reasons that your efforts to adopt the Clean Campaign Act of 1985 are so important. The Act will secure greater accountability of candidates, will result in more, and balanced, information being given to the voters, and should result in elections in which the primary issues are not the personal lives of the candidates, but their views on the significant issues confronting the public.

Unless the Committee feels otherwise, I would now like to call upon Ben to discuss the major constitutional issues surrounding the adoption of the Bill, and then we both will be available for any questions you might have.

Mr. HEINEMAN. I think it was Chief Justice Hughes who said that the Constitution is what the Supreme Court says it is. As Senator Packwood mentioned before, I think in this area we simply do not know what the law is with great certainty, what the Supreme Court will say. As we indicated in the written analysis we did for the committee, very reasonable and responsible arguments can be made that what you are proposing here is constitutional. There is uncertainty because there are divergent lines of cases coming together. I think if the bill were passed it would have a reasonable possibility of being upheld by the Court. But there is no way of predicting that until it got to the Supreme Court. Nonetheless I think a very responsible approach is being taken by the committee.

Let me just say that, with respect to constitutionality, I think the most important thing in this area are the goals of the legislation and the kinds of findings you make to support those goals. As I understand the purposes of this legislation, they are very consistent with first amendment values and with the goals that the Supreme Court has recognized in the broadcast area.

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[15] Those that claim that these reply-time provisions will unconstitutionally "chill" licensees' and others' rights to speak over the broadcast media ignore the initial fact that no one has the constitutional right to speak over the media, and also ignore the practice of broadcasters under present reply-time requirements to spread the cost of such free time among all advertisers, rather than denying access to the initial speaker. The Supreme Court has specifically held that broadcasters hold the right to use the scarce broadcast frequencies only as trustees for the benefit of the public, and that "[t]here is nothing for the First Amendment which prevents the Government from requiring a licensee to share his frequency with others. . . ." *Red Lion Broadcasting Co., supra* note 12 at 389.

[16] 47 C.F.R. §73.1930.

[17] *Red Lion Broadcasting Company, supra* note 12.

And those goals, as Newt Minow mentioned and as has been discussed before, are accountability, disclosure, balance in terms of having the opportunity to give opposing points of view, and more information. All those things, accountability, disclosure, balance, more information, are really what the first amendment is all about, and I believe those are the purposes of this legislation.

And if the committee can establish that clearly as it goes forward with either this legislation or some variant, I believe again there is a significant chance that the Court could uphold legislation in this area because the Constitution is not a suicide pact, and I think we are talking about a serious problem here.

[The statement follows:]

STATEMENT OF BEN W. HEINEMAN, JR.

Mr. Chairman, my name is Ben Heineman, Jr. I am appearing today with Newton Minow. We are honored to appear before this Committee to discuss the S. 1310, the Clean Campaign Act of 1985. We believe that the proposed legislation forthrightly addresses public policy issues of great importance. The Committee is to be congratulated on raising these issues to public attention. We hope that they will receive careful consideration by the Congress as a whole.

Mr. Minow has addressed some of the major problems which justify the proposed legislation. I would like briefly to discuss the bill's constitutionality. As you know, Mr. Chairman, last spring you asked our law firm to assess whether the bill was consistent with the First Amendment. We conducted a preliminary analysis which we have submitted to the Committee, and I understand that analysis will be part of the record.

Our analysis was preliminary because there had been no Congressional hearings on the bill as yet and, of course, no Congressional findings. I should stress that, in this sensitive area of constitutional rights, whether the bill would be held constitutional by the Courts will turn, in important part, on the precision with which the Congress describes the nature and extent of the problems addressed by the legislation and makes findings that justify the bill's approach to those problems.

Nonetheless, we were able to conclude that, with appropriate Congressional findings, there is a reasonable possibility that the courts would ultimately hold that the proposed legislation does not violate the First Amendment and is therefore constitutional. Our conclusion was stated in those provisional terms because, as you know, there are no Supreme Court decisions directly on point that allow anyone to say with certainty that the bill is clearly constitutional or clearly unconstitutional. Indeed, different lines of cases point in different directions. Accordingly, the bill is necessarily in a "gray area" where its constitutionality will ultimately have to be decided by the Supreme Court.

But, as our analysis indicates, very reasonable and responsible arguments can be made that the legislation is consistent with the First Amendment and, indeed, advances First Amendment values.

Let me briefly summarize the reasoning that leads to this conclusion. I should note at the outset that Congress' authority to legislate in this area is found in Article 1, Section 4 of the Constitution (the power to regulate the time, place and manner of federal elections) and Article 1, Section 8 (the power to regulate interstate commerce).

(1) CHANGES IN EXISTING LAW

As you know, the proposed legislation makes two major changes in existing law.

First, it creates a "personal presentation" requirement for candidate advertising. Under the 1934 Communications Act, candidates for federal office have a statutory right of access to radio and television. In other words, broadcast licensees must provide federal candidates a reasonable opportunity to purchase time for political advertising.

The bill modifies this statutory access right. A candidate for federal office who "refers" to his or her opponent must do so "in person" in political advertising in order to enjoy the statutory access right. If the sponsoring candidate chooses to refer to his or her opponent, but not to do so personally, then the broadcast licensee may still, in its discretion, provide the candidate time for advertising. But if such time is provided, then the broadcast licensee must also provide free response time to the opposing candidate. (The bill does not affect candidates' statutory access rights if no reference is made in advertising to an opponent.)

Second, the bill mandates free response time to non-candidate political advertising. Under the 1934 Communications Act, broadcast licensees may—but are not required to—sell time to non-candidates for political advertising. In other words, non-candidate sponsors of political advertising do not enjoy the statutory access rights ceded by the Communications Act to candidates.

The bill would require that licensees who provide political advertising time to non-candidate sponsors must also provide free response time to candidates for federal office whose candidacy is opposed, or whose opponent is supported, in that political advertising.

(2) PURPOSES OF THE LEGISLATION

As we understand them, the purposes of the legislation advance First Amendment values. The "personal presentation" requirement is aimed at increasing candidate accountability and disclosing to the electorate the relationship between what is being said and who is saying it. The free response time requirements are aimed at providing more information to the electorate through a more balanced presentation of views.

These watchwords—greater accountability, disclosure, information and balance—are wholly consistent with the Supreme Court's decisions defining the First Amendment rights in what the Supreme Court has called the "unique and special" context of broadcast media which receive licenses for scarce spectrum pursuant to the 1934 Communications Act.

(3) THE EFFECTS OF THE LEGISLATION

Challenges to the legislation are likely to be based on the claim that the bill's provisions improperly affect political speech—speech that is at the core of the First Amendment and thus deserving of the greatest constitutional protection. There are, as noted, reasonable and responsible arguments that both proposed changes in existing law do not impermissibly affect political speech.

With respect to the "personal presentation requirement, the courts might hold that, because candidate access rights are statutory and not constitutional, the Congress may modify those rights if it reasonably balances the interests of candidates, broadcast licensees and the public. Similarly, the courts might hold that the personal presentation requirement is analagous to other disclosure requirements which the courts have upheld: rather than requiring words identifying the sponsoring candidate at the end of an ad, the bill requires personal identification of the candidate during the ad under certain circumstances.

Alternatively, the courts might uphold the personal presentation requirement as a restriction on the time, place and manner of speech and not on the content of speech itself, because the bill does not regulate political ideas. Instead, it serves the significant governmental interests of accountability and disclosure and leaves ample alternative channels open to the candidate for the communication of ideas and information.

Finally, even if the personal presentation requirement, in the limited context of a "reference" to an opponent, were viewed as a restriction on the content of a political speech, such a restriction could be upheld if the Congress, as a result of the legislative process, finds that there is a compelling governmental interest in the restriction and that the restriction is the least intrusive alternative means for meeting the problem effectively.

With respect to the free response time requirements, the courts have upheld similar requirements in the broadcast area from First Amemdment attack and could reasonably extend those holdings to the types of free response time required by this bill. First, the courts have held that requiring broadcast licensees to provide free response time, if they air certain types of programming or advertising, does not violate any First Amendment rights of broadcasters because, in part, they are licensees of scarce spectrum which, under the 1934 Act, they must use in the public interest.

Second, courts have also held that the possibility broadcasters will not air certain types of programming or advertising in order to avoid free response time requirements must be shown with some specificity and particularity before a finding will be made that any speech rights have been "chilled." Speculative claims by those seeking access will not suffice to cast doubt on the constitutionality of a free response time requirement. Nonetheless, the Congress will have to examine the "chilling" question carefully. It may well be, however, the broadcast licensees voluntarily will, as they have in the past, choose to air programming and advertising that triggers free response time because of their statutory duty to act in the public interest, thus avoiding any serious constitutional claim of "chilling." In that regard, the Committee may want to consider including in the proposed legislation a provision requiring the Federal Communications Commission to study the effects of the bill and report to the Congress after several elections have occurred.

In conclusion, Mr. Chairman, I would like to emphasize that it has been a privilege to serve you and the Senate Committee on Commerce, Science and Transportation in the development of this important legislation

The CHAIRMAN. I think that both of you have very accurately stated my intention in working on legislation and addressing this issue, and I know Senator Hollings can certainly speak for himself, but I do not think that the Congress of the United States should be in the business of attempting to muzzle people. That clearly raises constitutional problems.

The question should not be how do we muzzle people but how do we provide for political campaigns where there is more information, not less, more disclosure, not less, better balance so that obvious imbalance in the system can be rectified. That to me has to be the goal that is before us.

I am not sure that this bill is the best approach, as I have said already a number of times today. But those have to be the goals. When we have a political campaign that can disassociate itself from the candidate himself, go on the air with a 30-second commercial, make the quick hit and not appear fairly to be the statement of the candidate who is benefited, that is not a full disclosure of the situation to the voters.

Voters have a right to know not just the bad things about a candidate. They have the right to know everything about both candidates. And therefore, I think that it is perfectly understandable to say you can go on the air and say anything you want, just show us it is you. Just show us it is you making the statement. Whether the candidate's face should be on 30 full seconds, I do not know. I have not thought that out. But it should not be just a second. It should not just be a phony. It should be a full disclosure that this is the person who is saying such things, not hiding behind the voice of someone else or a picture of somebody else.

And with respect to the political action committees, a fair chance to present competing ideas seems to me to be the heart of effective politics, but now somebody can come in in the 11th hour with a huge bundle of cash and the other person has already spent every penny that has been raised in the campaign, with a negative commercial, again with just the name on the bottom or maybe it is somebody who is not reticent. Maybe it is somebody who is delighted to have the publicity of being the hit man. You know, there are people like that.

But it is just not fair. It skews the system. It throws it out of whack. It threw it out of whack in Illinois, and it does wherever else it occurs, and it is just not right.

Maybe this is the greatest bill in the world and maybe it is not, but I know this: the ultimate question has to be answered by the American people. What do they think about the present state of political campaigns? What do the people think about the present state of the political campaigns? We are going to have it in the next hearing, all the people who run this stuff. Mr. Dolan has said that he did not have the opportunity to testify. The staff talked to him last week. They said you are welcome to come the second day of hearings. October 8 is the second day. Put it down on your calendars. He is going to be here, and we are going to have other people who believe in mudslinging. They believe in it, and they are going to come here and give us their position, and that is fine. And then let's let the American people think about it.

Is that really the political process? Have we maxed out? Have we reached the zenith of political debate with what we have seen, for example, in the last election year? Every time I turned on the radio or the TV in Missouri and heard what was going on in our State or over in Illinois, I will tell you, I was nauseated. It is just nauseating.

So it seems to me that this bill gives us an opportunity to at least focus on the problem, and to at least provide more disclosure and more information and more balance, nor to keep people off the air.

That was more of a speech than a question, I guess. I do not know if either of you would like to comment.

Mr. MINOW. Well, Mr. Chairman, one of the great first amendment scholars in our American judicial history, Justice Brandeis, said sunlight is the best disinfectant. I would regard this as a sunlight bill to put the light on who is sponsoring a commercial, whether it be an individual candidate who is doing it or whether it be a PAC, and I think it is strictly in the interest of the political process and the voter, to have the most sunlight constantly on the—particularly when the cost has gotten so high—on who is putting the money into these commercials, and if the candidate is doing it, then he ought to be identified with it and say yes, I did this, I saw this commercial, I approve of it. Then the voters can choose to vote or not vote for him.

The CHAIRMAN. Let me just ask this question. I hope that Charles Guggenheim is right in saying that if there was a major effort to turn the Senate around, the press would get wise in time. But let's suppose, for example, that the Reverend Moon were to decide that the Washington Times is not a good enough forum, that he wants to get into political campaigns and that members of his organization set up a PAC called the Good Guy PAC or something, and they go in and start buying massive amounts of time, millions of dollars in a few selected States.

Do you think that there would be a fair opportunity for the other candidate to make any response, or do you think the press would necessarily do an adequate job in compensating for that kind of imbalance? Or do you think that it is important to go further than what we have now and provide some additional mechanism so that we can be sure that the candidate who is the victim of this at least has a fair opportunity to weigh in on the other side?

Mr. MINOW. I think it is more than an academic risk because I think there is growing sophistication about the use of television in campaigns. Most people, if you believe the surveys, and I do, get their political opinions and news from radio-television more than they do from the printed word, and if something is rushed upon them in the last minute and there is not an opportunity to answer, I think there is a very serious risk that people can be misinformed and live to regret their votes because they did not have adequate information. So I take it very seriously.

And that is why it seems to me what the two of you have proposed here is not even to cut that off, somebody could still do that, but this would simply provide a balance, an opposing view to be heard in time.

The CHAIRMAN. Senator Hollings.

Senator HOLLINGS. We are indebted to both of you.

Mr. Minow, you have touched again the misunderstanding in a lot of the editorials that have emanated as a result of the introduction of this particular measure. We made a mistake. I would even move when we ever mark up perhaps the first amendment that we change the title. When we use this "Clean Campaign Act," then you know, that is us politicking again, and this is going to make things clean as compared to dirty, and what is clean and what is dirty? And that is not it at all. It is accountability. This is Campaign Accountability Act or Truth in Campaigning, or Sunlight in Campaigning or Political Exposure Act. I mean, they all think politicians are devious and working behind the scenes, so if you can get political exposure, that maybe would sell them.

But that is what we are really after. We are trying to affix that responsibility. I think that ought to be made clear, and it is misleading when we talk about clean campaigning or negative advertising. In fact, in the actual drafts, the drafting of it, we use words "anything critical." It can be critically constructive, it can be critically destructive or negative. But whatever, some person criticizing a fellow's voting record would say that is positive, that is going to the record. The person being criticized says no, that is negative. So we cannot get bogged down in that one.

And you have provided a very, very valuable service, and particularly as to how to go about this, and that sense of history is very important.

Mr. Heineman, how do I constitutionally do what Mr. Guggenheim says? How do I get campaigning—I am trying to get a little bit more than what this bill provides, obviously, and I am trying to bring it into prime time, and I am trying to get it away from the 30-second spots. I am trying to get it to be more deliberative and, therefore, more responsible on content without controlling the content. If I can get more time and put it in prime time and not by gimmickry and making the person appear, then on a limited campaign of a kind, that will be fine. And I can see us clean up our act. But how do I do it constitutionally?

Can you really study—I do not know if you can give me the answer right here at the table, but I wish you would study that for me because, as I say, that is now gone from the campaign. I fussed at my friend President Carter because I never thought he ever realized the difference between the campaign and administering the Office of President. He just continued as a candidate. That was his downfall. He hired a pollster and stuck him in the bedroom there and said give me the right answer on a major issue, and I will go on the 6 o'clock news and I will show how smart and erudite I am as President. We never had any vision of where the country was going or leadership in that sense. But he continued on as a candidate. So it took him out of office.

And it might take us all out of office if we keep on with this 20-second thing. We are not getting good public service. We have a vaster problem, and Senator Danforth and all of us agree on $200 billion deficits. But with the 20 seconds, lack of prime time treatment, no one is really disturbed about it right now, and we are not discussing it in a balanced or comprehensive way.

How do I do what Mr. Guggenheim says about 20 seconds in prime time with the networks?

Mr. HEINEMAN. I am just focusing on this issue today, but I think, that the committee probably could legislate constitutionally to say that broadcasters had to provide more than 20 seconds if the candidates wish to have more than 20 seconds. I think that you probably could legislate to say that a reasonable amount of political advertising had to be provided by broadcasters in prime time.

So I think from the point of view of regulating the broadcaster, my sense would be that would not pose constitutional questions.

I think the problem might come in telling the candidate you have to speak for more than 1 minute and 59 seconds, because, as you well know, the first amendment not only protects the right to speak but also the right not to speak.

Senator HOLLINGS. Surely that is true, but at least let's go that far. If you know a way, and we have preempted your very valuable time, but if you do not mind helping us a little bit further, try to draft, rough something out with respect to the broadcasters.

I agree, you cannot make a person go on TV or whatever it is, but we should at least start making that available. You see, our friend Sasser was fortunate. The free press took it up, and in fact, I think, there was one Tennessee newspaper that was his opponent that came out and said that was so scurrilous to show Senator Sasser. While it was entertainment, it was highly misleading. So he is indebted to the free press treatment.

Perhaps Senator Huddleston or Senator Percy did not get that. I was not that close to those particular campaigns, but at least if I had that availability and I could come on in prime time, you see, I have got an option. Now, let's say they assault me in the last minutes. I know right now, I can tell you I have got to go negative. That is my only opportunity.

That gentleman, Mr. Guggenheim, has never made a negative ad for me and no one else has ever made a negative ad for me. I just have not used it because, not that I am pure as the driven snow, I just did not think it was good politics. But knowing politics as I do, I am forced to go negative. By contrast, if I had this option, I would say, well, I would go on, and by golly, you give me 5 minutes and I can explain my voting record or this or that or whatever it is and answer that particular assault that has been going on. I would rather let it build up and then give me 5 minutes of prime time. I would rather do that than going negative and just explain to the voting public just what my record was or whatever was being attacked or whatever else, and I think I could do it. I would be at least given the option.

At the present time I do not have any option save to go negative. Do you see what I am saying?

Mr. HEINEMAN. Yes, and it should be noted that all of these rules, of course, only apply during campaigns. In fact, you might have these extended time period rules apply just in a very brief period before the election, 30 or 45 days, something like that. That also could help, would limit their effect to the most important period in a campaign and it would get to your problem.

Senator HOLLINGS. You would get better government.

I came back to Washington, we had the staff together, and we have had the debt limit bill coming, and now there are all kinds of monkeyshine amendments that will come up on the debt limit bill. Our friend Harry Byrd, of Virginia, back in 1978 said the budget shall be balanced. It is in the law of the United States. You do not have to get it into the Constitution. I can show it to you in the law, word for word; just totally ignored. But trying to PR it and everything else like that and explain away previous votes, there will be those members who will have those amendments who will say the budget shall be balanced, but you do this and you do that and everything else.

I happen to be on the Budget Committee, and knowing government as I do, that is an improper place, it is an improper procedure. It necessarily does not control, as I pointed out under the Byrd amendment, for a balanced budget and all of those things, but I am looking at the 20-second format or the 30-second format, and I do not have enough TV time money to get on there and explain what I know about budgeting and how to really work for a balanced budget and present a program and everything else of that kind.

And knowing that I do not have the money for it and I am controlled by 30 seconds, I will vote for it, just put out those amendments, I will vote for all of them. Let somebody else explain them. I have got to get reelected next year.

It is a crazy world, is it not?

What harm is it, I mean, if somebody wants to sit down at a proper forum and discuss it, then I can tell you just exactly what I am telling you right now, but I just do not have time and the money to go and explain those kind of things because of the actual control of that format, the 30 seconds, and not being able to get in prime time, I do not have that opportunity.

And, therefore, you get false votes, and they wonder why the Congress acts like it does. This thing is not just campaigning, gentlemen. It goes all the way down through your public service, and as a result, you are dealing with statewide races and everything else, let's say for a Senator, or at least district races for Congressmen and everything else. At the local level you do better because the people are there, they understand the local media, it is better coverage and everything else.

That is why, Mr. Minow, the Government in Washington is rancid. That is why the government in the statehouses and city halls are darned good. That is one thing I learned from a 3-year trip in a Presidential race, there was not anything wrong with the statehouses, and they are responding to the needs of the people and everything else, the media is there and you do not get by with 30 seconds bites and all that kind of stuff because it is all there immediately, and they immediately react.

But here in Washington the problems are so enormous in size and so many of them that that is the way we are living now, and everything else of that kind, and that is why you get irresponsible votes, irresponsible acts, irresponsible government, and nothing happens up here. It is all a big, you know, spectator sport. It is not government anymore.

Mr. MINOW. The two of you, it seems to me, are taking a long view at a big issue. If you were a philosopher and you looked at this, the anniversary of the Constitution, 200 years is 2 years from now. If you were starting this country today rather than 200 years ago and you looked at the map, you would not draw the boundaries that we have. You would do what the television and advertising business has done and divided the country into market areas, and you would say no, there should not be 50 States, there ought to be 152 markets because that is where the people are. They are in that circle every night watching the news. That is the commonality that brings them together.

So what you have got now is a mismatch between the technology of television and the political process that we have all grown up with, and what you are trying to do, and this is one part of it, is bring those two things into a better harmony, and that is very hard to do. We will be of any help we can to you as you try to work through this, because, I think, there is a great deal at stake, a great deal at stake.

Senator HOLLINGS. Thank you very much.

The CHAIRMAN. Gentlemen, thank you both very much for appearing today, and also for your help in putting the bill together. We really appreciate it.

This is the first of what will be several hearings on this subject. The next one will be on October 8, and at that time we will have a number of people testify who oppose the idea of the bill.

[Whereupon, at 12:55 p.m., the committee recessed subject to the call of the Chair.]

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CLEAN CAMPAIGN ACT OF 1985

TUESDAY, OCTOBER 8, 1985

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m., in room SR-253, Russell Senate Office Building, Hon. John C. Danforth (chairman of the committee) presiding.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. This is the second day of hearings on S. 1310, the Clean Campaign Act of 1985, which was introduced by Senator Hollings, Senator Goldwater, and I, and other Members of the Senate some time ago.

The bill is designed to provide more accountability and balance in Federal campaigns. It stems from a growing concern not only here but throughout the country about the quality of modern political campaigns. I think it is pretty clear to anyone who turns on a television in the last couple of weeks of an election that something has gone very wrong with political campaigns. It is the advent of the 30-second commercial and the quick hit, and the proliferation of so-called independent committees, which specialize in negative advertising, going into a State or going into a congressional district and running negative commercials without the target of the campaign having a fair opportunity to reply. That is what gave rise to the proposed legislation.

I have pointed out throughout the discussion of this bill that there is nothing in it that is carved in stone. We are open to suggestions. A lot of thought went into the preparation of the bill, including advice of legal counsel on legal and constitutional questions. We are very aware of the need to write something that passes constitutional muster.

I think that there is a clear sense in the country that what has happened in political campaigns through the availability of 30-second commercials and the negativism that is all part of something that really is a harm to the political process itself. This has harmed and caused damage to what is a basic right of the American people, and that is to participate in a reasoned way in the selection of their elected representatives.

Today we have three witnesses. We are pleased to have with us today three people who have been involved in independent campaigns. The first witness is Mr. John T. Dolan, Terry Dolan, national chairman of the National Conservative Political Action Committee.

Please proceed.

STATEMENT OF JOHN T. DOLAN, NATIONAL CHAIRMAN, NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE

Mr. Dolan. I have submitted a statement, which I won't read, but I would like to make several comments about this bill. It reminds me of a statement that Eugene McCarthy has made many times about so-called political campaign reform. This bill is the type of bill that King George would have thought of to finance the American Revolution.

In fact, the lip service that some of the sponsors have given about protecting the quality of debate is nothing more than that. The Supreme Court in *Buckley* v. *Valleo* said:

> Discussion of public issues and debate on qualifications of candidates are integral to the operation of the system of government established by our Constitution. The first amendment affords the broadest protection to such political expression in order to ensure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

In fact, what this bill would do is stifle political debate, not based on truth, falsehood, or anything else other than who makes the charge. That is bizarre. That is unconstitutional.

More recently, in 1985, this year, the Supreme Court said:

> We also reject the notion that the PAC's form of organization or method of solicitation diminishes their entitlement to first amendment protection. The first amendment, freedom of association, is squarely implicated in this case. PAC's are mechanisms by which large numbers of individuals of modest means can join together to amplify the voice of the adherents.

It is very clear, I believe, to most observers of this bill that it is unconstitutional. Anything which regulates the content of speech, the Supreme Court has said over and over and over again is unconstitutional.

I would also like to rebut some of the falsehoods that have been brought up in the first day of hearings. I was originally scheduled to appear on the first day of hearings, but somebody decided here that that would be inappropriate.

As a matter of fact, I was not invited to any hearings until we issued a news release announcing that the subcommittee had indeed withdrawn the request for me to speak, and I suspect that was done deliberately so the other side of the argument could not get out on the first day of hearings, where most of the press coverage would be.

There were so many falsehoods, I will just deal with the three or four that I think were the most substantial. I think a good number of the people giving testimony said that they thought negatives ads were a threat to democracy. That is absolute nonsense. In fact, negative ads provide valuable information that frequently the media does not talk about and certainly incumbent Senators don't talk about.

I do not remember seeing any U.S. Senator up for election in 1978 or 1979 or 1980 saying that they voted to give away the Panama Canal. I do not recall anybody saying that. What this bill would do is prohibit individual groups from getting that vital information out.

What I would like to do right now is show you a commercial by a candidate for the U.S. Senate, and two of them, the first two would be illegal under this present law.

[Videotape shown.]

Mr. DOLAN. Let me make a few comments before I show the third commercial. I am intrigued by Senator Danforth's "stop-me-before-I-kill-again" philosophy with this bill. The very commercials he used to win reelection would be unacceptable under this bill.

Now, I think there is a point to be made about the hypocrisy of doing that type of thing, but that is not my principal point. As far as I know, everything that was in those commercials was true. In fact, it probably provided more information about Harriet Woods' record than Harriet Woods' commercials. I do not know that for a fact, but I am certain the same is true for Senator Danforth.

Now I would like to show you a commercial which would become the way of the world in political life if Senator Danforth's bill is passed.

[Videotape shown.]

Mr. DOLAN. That is it. That is what we can look forward to, 30 seconds worth of trash, telling people that they should elect a Senator because he has got four children, because he walks on the beach with his dog, because he is a family man. These types of commercials are an insult to the average voter. They indeed are the threat to democracy. They are the ones that imply the candidates are bars of soap.

We talk about accountability. The best way to make a Senator accountable, Senator, is to have people discuss his record and have him say, here is what I will do when I am elected. Your bill will cut off accountability to the largest degree I have ever seen any bill that relates to political reform.

Another falsehood which came up was the notion that negative ads create apathy and cut turnout. Again, nonsense. There is no support for that statement. In fact, there is plenty of support for the opposite statement. The most expensive and negative campaign in the history of this country, I think most people would agree, was in the North Carolina Senate race in 1984. Well, just a couple of facts which might intrigue you.

Registration increased in North Carolina 16 percent in the 1984 election, one of the largest in the country. Turnout was the highest in the history of North Carolina. Now, what does that suggest? It suggests that because of the high volume of negative campaigns, that we saw an incredible amount of interest because people finally learned what the candidates for office were talking about.

Another point was the accountability, that these things are unaccountable. That is simply wrong again. As I said, negative commercials usually make a candidate accountable. He has got to answer how he votes in Washington, DC.

Secondarily, the groups, the individual groups which run independent expenditures indeed are accountable. They are accountable to their contributors, and in the case of NCPAC, I suspect we have more contributors in the State of Missouri than Senator Danforth has to his own campaign. We have probably more than Senator Pressler or Senator Ford or any one of the sponsors, and we are accountable to our contributors for that very reason.

But perhaps more substantial than that, we are accountable to the courts of the United States of America. Libel and slander are not exempted for our commercials. A candidate for the Senate can say anything he pleases, and he is protected from libel and slander. We are not, and I find it quite ironic that if you are interested in getting rid of unfair negative commercials, the commercials that do not state the record properly, that you do not get rid of the libel and slander exceptions for candidates. That is the best way of doing it.

The last falsehood is that negative ads contain distortions and lies and so on and so forth. Again, that is simply inaccurate. The record shows that is inaccurate. We have spent about $20 million in independent expenditures. During that time we have never once had a judgment against us for libel, slander, equal time, or personal attacks that could possibly keep us off the air.

Not only have we never had a judgment against us, we have never had a case filed against us. Never once. And I think that is also true for other groups which have done the same thing. Broadcasters are keenly aware of the fact that what we put on the air, they might be liable for, so they are very interested in seeing that we document every charge back and forth in a dozen ways.

The Senators who have sponsored this bill ought to be ashamed of themselves. They should be ashamed of introducing a bill which even the drafters admit could be unconstitutional. The last time I checked, you took an oath to uphold the Constitution as a U.S. Senator. You are not doing that, and you are doing it precisely because of tacky political considerations.

You should be ashamed for introducing a bill which would change rules in order to protect incumbents, which would cut off vital and truthful information to the voters, and if passed, would outlaw commercials which you, I would presume, most of you have used before. The substance of this bill is that broadcasters and individuals are treated like they are idiots.

I think the real motivation behind this bill is accurately stated in Senator Danforth's own statement, when he said:

> I sense an increasing mode of defensiveness, of testiness, and a breakdown in the comity and collegeality that we need to function as a deliberative body. There is a sense of fear here based on the apprehension that when we face election, our opponents will use negative tactics against us, and we will have to use such tactics against them to survive.

Senator, that is true. It is absolutely true. But what you see as a threat to democracy I call democracy itself. Elections were not made for you and your colleagues. They were made for the voters, and that is perhaps the most dangerous thing about this bill. It further insulates Congress from accountability to the voters by hiding the truth about their record.

Thank you.

The CHAIRMAN. Thank you, Mr. Dolan. Do you remember making this statement?

> Groups like ours are potentially very dangerous to the political process. We could be a menace, yes. Ten independent expenditure groups, for example, could amass this great amount of money and defeat the point of accountability in politics. We could say whatever we want about an opponent of a Senator Smith and the Senator would not have to say anything. A group like ours could lie through its teeth and the candidate it helps stays clean.

Did you say that?

Mr. **Dolan**. I did indeed, but I would appreciate it if you gave the quote in context.

The **Chairman**. Well, I would be happy to. In fact, I will put the article in the record. It is from the Washington Post on August 10, 1980.

[The article follows:]

[From the Washington Post, Aug. 10, 1980]

THE NEW RIGHT BRIGADE

(By Myra MacPherson)

"Groups like ours are potentially very dangerous to the political process. We could be a menace, yes. Ten independent expenditure groups, for example, could amass this great amount of money and defeat the point of accountability in politics. We could say whatever we want about an opponent of a Senator Smith and the senator wouldn't have to say anything. A group like ours could lie through its teeth and the candidate it helps stays clean."

So speaks John Terry Dolan, 29, one of the foremost leaders of the New Right. A collection of far right groups, they have become a phenomenon in this election year. They are the "independent expenditures" brigade. They have been denounced by liberals and some mainstream conservatives alike. Dolan is chairman of the National Conservative Political Action Committee (NCPAC). It is, according to preliminary Federal Election Commission reports from January 1979 until this June, the leader of all PACs in gross receipts—over $4 million. "We're bugging the hell out of them," says Dolan, with a self-satisfied grin.

A short, slim, mustachioed young man, Dolan proudly shows off his suite of offices in Arlington, where he creates his "attack" ads, brochures and fund-raising pleas, collecting and spending thousands a month. NCPAC is active on two fronts. (1) Targeting six liberal Democratic senators—Frank Church, George McGovern, Alan Cranston, John Culver, Birch Bayh and Thomas Eagleton—spending almost $700,000 on predominately negative advertising. (2) It is one of five committees dedicated to raising millions in support of Reagan's candidacy.

Dolan goes after his opponents with the ferocity of an enraged terrior; senators hit by his ads howl that they are spurious, distorting, often inaccurate, and that there is at very least a tacit acceptance of Dolan's function by some of their opponents. Let them howl, says Dolan. For Dolan is not only finding loopholes in the Federal Election Reform law, he is taunting the FEC, the lawmakers and everyone else. "It's a stupid law. They're gonna take me kicking and screaming to jail before I stop my activities. Look," says Dolan, punching out his sentences in fast bursts, revealing his true intention in a repeated battle cry, "we're saying 'come and get us.' That law should go."

Dolan's theories often have an interesting simplicity to them. Take government management, for instance. He scathingly says Reagan does not go far enough with proposed budget and tax cuts. The federal budget, under Dolan, would be doled out this way: "99 percent for Defense—keep America strong—and 1 percent on delivering the mail. That's it. Leave us alone."

Critics of the New Right decry what they perceive as a no-compromise, no-accommodation stance. Liberal George McGovern calls the members of the new right, "angry and intolerant, equally incapable of believing that they can be mistaken or that those with whom they disagree might have honorable intentions. They call themselves 'conservative' but their zealotry, self-righteousness and vindictiveness toward those with whom they disagree connote something radically different from authentic conservatism."

And some Republican officials have characterized NCPAC as a "loose cannon on the deck." William Brock, national chairman of the Republican Party, commented, "You can't build a party around those emotional social issues. The New Right groups . . . draw attention in Congress away from the broad issues of tax reduction, job creation, health care, housing—the American Dream issues."

Says Dolan: "Brock should have been fired long ago." Dolan once said, "The Republican Party is a fraud. It's a social club where the rich people go to pick their noses."

What are NCPAC and other similar groups managing to do, and why is everyone so angry? And why have lawsuits, charges and countercharges been flung with all the regularity of campaign promises? A brief explanation:

The staggering facts department of elections, American style, revealed that in 1972 a mere 153 indivduals contributed $20 million to President Nixon's campaign. Reacting to Watergate and such contribution practices, Congress passed the 1974 Election Reform Act. Individuals can contribute only $1,000 per election to a candidate for federal office, including president. And groups like NCPAC are allowed to contribute $10,000 directly to a Congressional and presidential candidate ($5,000 primary and $5,000 general). Once a Democratic or Republican presidential nominee accepts federal funds, private contributions are prohibited. But now, in 1980, various "independent" groups—including NCPAC—are gleefully spending millions to defeat senatorial candidates and additional millions on Ronald Reagan's campaign. How so?

In 1976 a collection of odd couples in politics—from leftist Eugene McCarthy to rightist James Buckley, from the ACLU to Human Events, the conservative weekly—challenged the election reform law on the ground that it violated their first amendment rights. The Supreme Court ruled in basically upholding the act that indpendent groups cannot be prohibited from spending any money in support of or in opposition to a candidate so long as there is no *collaboration or cooperation* between the campaign and the people making these independent expenditures.

Now enter the "independents"—who have seized upon his loophole to spend their millions. These PAC's differ from corporate and labor union PAC's. Independents can, as one FEC official said, "solicit the world," reaching out to the public while corporate and labor union PACs can only go to a targeted group for their money—the corporation to its stockholders, executives and administrative personnel; the union to its membership. In addition to its activity in senatorial races, NCPAC is one of five committees aiming to raise from $35 to $55 million to support Reagan's candidacy. Reagan has already picked up his $29.4 million check from the U.S. Treasury. The Reform law said that was all he was supposed to get. But NCPAC and other groups (which include among them longtime Reagan supporters Senators Jesse Helms and Harrison Schmitt who were Reagan delegates at last month's convention) say they are independent enough to raise the megabucks on Reagan's behalf. Dolan's "Ronald Reagan Victory Fund" plans to spent $4 million (they spent almost $100,000 last month alone) and Dolan proudly claims, "We're the first of the independents to get on the air with our ads."

A sample of the ads: "In 1976, Jimmy Carter said, 'Why Not the Best?' That's what he said. Now look what he gave us: Andy Young, the man who called Ayatollah Khomeini a saint, forced to resign after lying to the president; Bert Lance, forced to resign for questionable banking practices, Peter Bourne, forced to resign for supplying drugs to a White House staffer."

A definition of "independent" is a sometime thing. Terry Dolan has more than a passing awareness of Ronald Reagan. NCPAC filed with the FEC in 1975 and a few months later a personal letter from Reagan asked his legion of supporter all over the country to support the Virginia-based outfit. "He is," claims Dolan, "one of the main reasons NCPAC is here today." Terry Dolan's brother works for the Reagan campaign. Dolan's chief pollster, Art Finkelstein, does work for Reagan. Dolan is co-owner of an Alexandria office building along with longtime Reagan aide Lyn Nofziger; Paul Russo, a 1980 Reagan campaign staffer; and Roger Stone, Reagan's northeast coordinator in the primaries and now a consultant to Reagan and former NCPAC treasurer. A tenant is Richard Viguerie—NCPAC's virtual creator and rightwing, fund-raising czar for Reagan as well as many of the independent expenditure groups. A network of friendship and contacts began when most were Yaffers (members of Young Americans for Freedom.) "There is no crime in being friends," argues Dolan.

The Democratic National Committee charges in its complaint to the FEC that all this coziness of New Right leadership forms a "seamless web" and that they are "probably incapable of acting truly independently of each other." Common Cause is suing one of the committees, Americans for Change. (Arguments will be heard this week.) "There is collusion in this," charges DNC Chairman John White. "It's the same old heavy-handed misuse of the political system." Archibald Cox, chairman of Common Cause, claims such independent groups "threaten a return to the old Watergate tactics and influence of money in politics."

Dolan says he makes few moves without checking it out first with his lawyers. "We got an advisory opinion from the FEC which says the use of polling data is not an independent expenditure' it's an 'operating expense.' So whether Finkelstein does stuff for us and Reagan is beside the point. I know it's a ridiculous ruling but the FEC is stupid. We asked them the nine toughest questions we could think of on what constitutes 'independent' and they came up with nine of the stupidest answers. The lawyers check over our ads for libel. So if Andy Young wants to sue, sue."

So the challenge goes on as to whether these groups of friends are independent (they claim they do not consult with Reagan or his staff). Fred Wertheimer of Common Cause contends, "If they figure out a way not to make direct contact, their actual philosophy is one of coordination and it is quantitatively different from a truly independent guy out in Des Moines taking out a full-page ad because he likes the candidate."

In a display of candor, Jesse Helms—the Patron Saint of NCPAC—allowed as how at the Republican convention it's been an "awkward situation" since the federal election law "forbids me to consult with him [Reagan]. I've had to, sort of, talk indirectly with [Sen.] Paul Laxalt [Reagan's national campaign chairman]." Helms drawled, "I hope that he would pass along, uh, and I think the messages have gotten through all right." Dolan says his commercials will "depend on the Reagan campaign strategy." And how is he going to find that out? "By reading the newspapers on his plans."

The chuckles in NCPAC circles are long and loud. But for those who see a troublesome subversion of the intent of the law, it is no laughing matter. Says Wertheimer, "NCPAC and Dolan and these other groups are out to destroy campaign financing laws. They want to eliminate the parts that have been effective. Today you don't see huge sums from single contributors looking for favors. These groups want to unravel the whole process and get back-as-quickly as they can to the big spender days when 152 individuals contributed $20 million to Nixon."

As for the FEC, its critics form a long line; the agency seems to have all the clout of a moth hitting a summer screen. One FEC official admitted that the battle could drag on indefinitely, that the FEC, with its makeup of three Democrats and three Republicans, is leery of "interjecting itself. Either way it acts it's going to be preceived as political." With a sigh, he delivered a true bureaucrat's lament. "This is a very strange place. We've achieved the distinction of being disliked by everybody—those who think we can do something and those who think we can't."

Dolan sits in his office in front of pictures of some of the senators he's targeted this year. The hair is close clipped, the mustache trim. From time to time, Dolan opens his bottom drawer, gets out a roll of toilet paper, rips off a few pieces, blows his nose and puts the roll back.

Some of Dolan's views sound like slogans of raw anger. "The biggest threat to America-it isn't the commies, it isn't the oil companies. The biggest problem is the United States government. The U.S. government has done more to destroy the American spirit." "There's nothing unjustified in ridding the world of Fidel Castro. He's the same as Idi Amin. The only difference is one has a beard," and then the smile, "and one has darker skin." He admires William Buckley because he can "knock anybody down in two seconds." He admires "the strength of a Patton or a MacArthur." Carter is "our weakest president ever." It is easy to get around the FEC because "they're a bunch of mindless bureaucrats who know less about the first amendment than they do politics."

Dolan says "Liberals never bother to find out if conservatives are right. Take a voucher system for education—if you paid for private education, you'd get tax breaks." How would that help families with children in public schools? "Who said it would?" Well, what if you can't afford private schools? "Well, thats who public school is for," he say indifferently.

Dolan is also for getting the government out of nearly everything that doesn't please him. Federal social programs should be done away. "Say next year we cut all food stamps. It would take moral courage, if that's what is takes, to. If you were a local politician, decide your state was going to give out food stamps. Gov. Carey, say is going to have to have the courage to give out the food stamps, not the federal government. Of course, I don't think people should starve in America. But our system discourages responsibility."

A special scorn is reserved for the liberal targets of his negative advertising—Senators Church, McGovern, Bayh, Cranston, Eagleton, Culver. "I like to see 'em squirm. They deserve it." Dolan proudly points to his polls that show Church and McGovern behind, and thinks there is a good chance "at least two, possibly four, can be defeated. It's just possible that the conservatives could take control of the Senate."

Dolan has been called everything from irresponsible to sleazy by those he targets. A few years ago his heavily negative espousals would have been considered on the fringe. RNC Chairman Brock has denounced the independent approach as detrimental to the RNC mainstream fund-raising. Dolan sneers, "Every chance he's got

Brock tries to screw Reagan. He's frustrated by jealousy. We're raising the funds. We're on the cutting edge of politics."

Lest one confuse Dolan with mainstream Republicanism, Dolan hastens to thumb his nose at both parties. "The only difference between Republicans and Democrats on a presidential level is the Democrats tell you they're going to screw you and the Republicans tell you they're not going to screw you—and do it anyhow."

He likes to appear impervious to the charges leveled at him. "I'm not after respectability. That doesn't bother me. The only thing I care about is if we're effective. I'm absolutely convinced our negatives on Carter will stick. We're got a couple more 'attack spots' planned." One will include Billy Carter. Ethnics and southern accents will be prominent as Dolan develops plans for his rural markets, but there will be no blacks. "Let Brock spend the RNC's money to try to get the vote," he said.

Some Reagan aides murmur that Reagan privately wonders if Dolan and others like him will create a backlash with their negative advertising, but Reagan so far has done nothing to publicly disavow them.

Dolan's ads are more often than not "against" a candidate, rather than "for" someone. Alan Crawford's new book "Thunder on the Right," calls the New Right the "politics of resentment."

Dolan retorts, "I know I'm screwed up, but at least I admit it. That's more than I can say for the author of that silly book."

Dolan seldom loses his cool but one subject that causes a bit of nervous fumbling is something his opponents discovered last week. NCPAC has not reported a single itemized contribution since October 1979—despite over $2 million in receipts. Dolan admits the omission. "I just found that out! We're going to take immediate action; of course we're going to amend the reports," he says quickly. "It was just a comedy of errors," he contends. "We had, ah, a new bookkeeper and she just discontinued itemizing them." [According to federal statute, any contribution over $200 has to be itemized, failure to do so could be ruled a serious violation of disclosure laws.) "I just don't know what happened. We're not trying to hide anybody. We don't have any H.L. Hunts. I wish we did. Joe Coors has contributed but not this year."

One irony is that the very law he lambastes, created the Dolans and Vigueries. The direct mail mills (Viguerie has a reported 5 million names) sprang up when small doners became vital to campaigns after large individual contributions were ruled out.

Opponents accuse Dolan of bending and distorting the facts. Dolan himself seems to indeed have a casual attitude toward some of the the details in his advertising.

In a spoof of the Dating Game, Dolan put together a minute radio spot called The Rating Game. It was used against Cranston, Bayh, McGovern, Church and Culver. In each ad there is a "Mrs. Verna Smith"—from Sacramento in one, Indianapolis in another, and so on. "Oh yeah, that name appeared in all the ads. It's a phony name, but I don't think anyone listening to the ad would take it seriously."

Dolan also plans a half-hour film "using Ronald Reagan. That'll drive the FEC crazy. It's a part of his acceptance speech. I think we are violating the regulation—it says you cannot rebroadcast something of the candidate—but as far as I'm concerned, the regulation is unconstitutional," says Dolan.

An exasperated Frank Church accused Dolan of "scummy tactics" and was successful in getting NCPAC to withdrawn an ad that erroneously accused him of voting to increase his Senate pay. Another ad—which stayed on—showed an empty missile silo and stated that because they were empty "they won't be of much help in defense of your family or mine. You see, Senator Church has almost always opposed a strong national defense . . . ." The obvious implication was that Church's votes has emptied out that silo—even though it has been made obsolete by a more advanced weapons system. "Innuendo? Sure," says Dolan. "But I have absolutely no ethical qualms about that. It's symbolic of his record."

Ads against George McGovern charge that he is a "baby killer" (he is pro-choice) and one has him in the gunsights as a 1980 target. "That's not our stuff, even though he is a baby killer. We wouldn't use such rhetoric. McGovern in the gunsight, I don't see anything wrong with that. It was not intended to mean you ought to shoot McGovern." Who did those ads? A man named Dave Bell. "Well, Bell used to be an employe of ours—but not in this campaign." Some NCPAC ads attack McGovern as favoring "a gas tax that could reach 50 cents a gallon . . . and voting against energy tax incentives." McGovern staffers protest "that's dead wrong. He has never proposed such a tax measure in the Senate." To that Dolan says, "Well, he supported Anderson's plan." Back to the McGovern staff: "He never did! And McGovern has cosponsored measures and voted for energy tax credits for individuals and companies installing energy conservation devices." Dolan says "They're lying."

Dolan users The American Farm Bureau Federation, a right wing, anti-union group, to base his rating on farm votes. Senators he attacks howl that this distorts the vote and that Dolan should use the National Farmers Union rating. Dolan says, "That's just a pro-union, anti-business organization."

When Dolan kicked off his Get Eagleton campaign, the senator's staff fired off a letter to Dolan: "Your 'analysis' of the Eagleton record which you distributed yesterday fully lives up to your earned reputation for inaccuracy, distortion and untruths." NCPAC castigated Eagleton for "giving $75 million of taxpayers' money in aid to revolutionary government in Nicaragua." Eagleton voted *against* aid to Nicaragua, his staff pointed out. NCPAC said Eagleton voted against the Hatfield amendment which would cut off funds for the neutron bomb. Eagleton, in fact, supported only one restriction on the neutron bomb. Shrugs Dolan, "We had corrections passed out at that time. We sent letters to radios and newspapers and said we did make a couple of mistakes in the analysis of the record—but that just proves he doesn't vote all bad all the time. They're just trying to discredit us. Want to make out we're schnooks."

In a last winter fund-raising letter to "stop Kennedy," Dolan charged that Kennedy "can legally spend as much of his own money [on his own campaign] as he wants—and he's got millions." When asked about it, Dolan seemed vague about the details, even though he signed the letter. This is, of course, inaccurate, as Kennedy had applied for matching funds and is therefore limited to spending $50,000 of his own money. "Oh, our statement was an accurate statement of the law—we didn't mention matching funds. It's all so incredibly irrelevant."

Dolan's father was manager of the Sears Roebuck store when he was growing up in Fairfield, Conn. Irish Catholic—except for "one-quarter Swiss"—Dolan learned about politics early. His mother ran for local office when he was young. At first the Dolans were Democrats but switched to the GOP. "They even voted for Jack Kennedy because he was Irish," Dolan recalls. Dolan attended private high school in Connecticut and then Georgetown University. "I managed to survive four years of their (Georgetown's) socialist doctrine," he says witheringly (1968 to 1972). Dolan was in school during the Vietnam War although he "firmly believed it was a moral duty, trying to resist communist aggression." Dolan was heavy in the Yaffer movement and in such counter-protests as Honor America Day.

He majored in government and German.

His brother, Anthony, went on to become a Pulitzer Prize-winning journalist and Dolan drifted more to the right in his interests. "I used to be a Republican. I used to be a political hack, but then in 1972, it was like a sexual awakening. I couldn't understand these strange urgings to do conservative things. On the ballot I saw John Schmitz [the American Party presidential candidate who once quipped that he had 'gone pretty far in life for a Catholic Bincher with a mustache'] and I had this urge to pull the lever."

Dolan worked for right wing causes and then got in on the ground floor when NCPAC was formed in 1975—along with Charles Black, a former Helms aide who worked for Reagan until he was fired along with campaign chairman John Sears this spring. Dolan describes NCPAC as a "central bureau to help conservatives—both Democrats and Republican. Helms was "the prime mover. He gave us credibility." A huge stockpile of lists and names in Viguerie's and Helms' possession were fed into the NCPAC operation. "Helms just went to his magic computer," says Dolan. The appeals are often on emotional social issues. "Oh, no question," says Dolan. "It is a *perfect* list for anti-abortion, anti-ERA, anti-gun control and pro-Human Events [magazine]."

Dolan acknowledges that NCPAC was a creation of Dick Viguerie. "In 1978 about 90% of our money was Viguerie-raised. Now he does about 50%—probably a little over $2 million by the end of the year." At one time he was heavier in debt to Viguerie but now says NCPAC owes "only about $50,000."

There seems to be no getting around Dolan's luck with the FEC—the group he constantly belittles. The South Dakota Democratic party filed a suit challenging Dolan's independent status, charging that he openly encouraged Jim Abdnor to run against McGovern. "I *know* we did," says Dolan with a chuckle. "*We* admit it. *He* admits it. We just led him up to the nomination. We got an advisory from the FEC that we could do it." The FEC has reportedly decided to rule 4-2 to dismiss the suit.

Dolan leads a visitor around his empire—a whole floor of an Arlington office building. Next to his office is the National Conservative Research and Education Foundation and next to that in Conservatives Against Liberal Legislation (CALL). Dolan is on the board of directors. Rhonda Stahlman, who runs CALL, a lobbying

> outfit, can be buzzed on Dolan's telephone. A handful of volunteers are working zerox machines; there are "Nuke Now" signs around.
>
> "There is a commonality of board of directors but we keep the finances separate. We used to do post-election analysis—but why should NCPAC do it when a tax deduction agency [his research outfit] can do it? It's totally legitimate. Sure we use the information in upcoming elections but there is nothing wrong with that."
>
> There is, in fact, a real sense of expansiveness as Dolan brags. "Nothing that NCPAC does is illegal. If we went out of business tomorrow I could pocket everything. Of course, I wouldn't—but I *could*. Why? Because the law makes no sense. They ought to scrap it." The smile is there to the last. "You can do what you want with PAC's."

Mr. Dolan. Well, unfortunately, Senator, the Post did not put it in context, which is nothing new for the Post. When I was asked what was wrong, I made the comment in this interview that election laws were foolish, and they were hurting debate in the country, and that they had caused independent expenditures, and independent expeditures were dangerous. The reporter asked how, and I said, well, that no time and no place are you permitted, is it ever justified to lie or to distort a candidate's record, but it could, and I said it at the end of the statement, at no time was it justified.

Now, are you saying could an independent group do that? Yes, they could. They might get away with it. They might not be sued for libel and slander. That is exactly what we have right now with candidates who do mailings, which this bill would not cover, candidates who do newspaper ads, a candidate who makes public speeches.

The Chairman. To you the only test is whether you are going to be sued for libel or slander?

Mr. Dolan. No, not at all. Not at all.

The Chairman. That is the thrust of your testimony, that if you are not sued—of course, public officials have an extremely heavy burden in any defamation suit, as you probably know, but you seem to think that the only test of responsibility in running a commercial on television is whether you are going to be sued for libel or slander. It is not accuracy. It is libel or slander.

Mr. Dolan. Well, if you say that the substance of my statement had to do with libel and slander, I am surprised. I think I made that point once during the entire statement. The substance of my testimony is that negative ads speak the truth. Excuse me. If they come from independent groups, they speak the truth.

I do not believe anybody who has used "negative ads" on television and radio has ever been cited for fairness doctrine problems, personal attacks, all the other things. Why, because the broadcasters are extremely careful about what they put on the air and, by the way, because we take great care only to say what I think is true.

The Chairman. Was NCPAC's commercial saying that Frank Church had voted to raise his own salary? Was that true?

Mr. Dolan. No, it was not. It was not a television commercial, and it was a good illustration of why——

The Chairman. What was it?

Mr. Dolan. It was a newspaper ad.

The Chairman. Was it run by NCPAC?

Mr. Dolan. It was run by NCPAC.

The Chairman. Was it true?

Mr. DOLAN. It was false. When we found out, we took out an ad of equal size and apologized for the mistake, which is more, I am certain, than any of you or your colleagues have done.

The CHAIRMAN. Did that make it right?

Mr. DOLAN. It was a mistake, Senator.

The CHAIRMAN. Well, when you state that you never say anything that is untrue——

Mr. DOLAN. What I said is, we never put anything in a television commercial which was untrue, and the reason we do not is the huge burden that broadcasters have to see that the truth is on. It was a good illustration of why the broadcast industry is much more careful in its handling of these issues than are print.

The CHAIRMAN. Did you run a commercial saying that Senator Eagleton had given $75 million of taxpayers' money in aid to the revolutionary government in Nicaragua?

Mr. DOLAN. No, we did not.

The CHAIRMAN. You did not say that?

Mr. DOLAN. We did not do that.

The CHAIRMAN. We should all buy bumper stickers that say "Don't Believe the Washington Post?"

Mr. DOLAN. You are correct. I would just like to point out parenthetically again in fact what the Post is referring to. When we announced our campaign against Senator Eagleton in 1980, we had a long fact sheet on his record which I brought out to Missouri to announce at the time.

When I got there my staff called and said that one statement on the fact sheet is inaccurate, so when we held a news conference and it was in fact in the fact sheet, when we held the news conference, I said that one statement is inaccurate, but we are going to pass it out anyway.

The CHAIRMAN. You knowingly passed it out?

Mr. DOLAN. With about 150 statements, yes, and I said to each of the reporters there, we are passing this out, but it is wrong, and we are not making the charge. Every single reporter there respected that and did not say we were making the accusation. Senator Eagleton took it and then started publicizing the fact that we were making the charge, which I think makes it even more dishonest than some of the things you are talking about.

The CHAIRMAN. Is NCPAC effective, Mr. Dolan?

Mr. DOLAN. Very. We are like anybody else. Sometimes negative commercials are extremely effective, sometimes they are not, and again——

The CHAIRMAN. What candidates has NCPAC opposed that lost the election?

Mr. DOLAN. I cannot remember all of them, Senator Danforth.

The CHAIRMAN. Can you just name a selective group of candidates where you can claim success for the campaign?

Mr. DOLAN. We do not claim defeating anybody. We claim that we helped expose an incumbent Senator's record to the public.

The CHAIRMAN. What are your successes, though? I mean, if you were to convince potential contributors that you are an effective organization, what is your success list?

Mr. DOLAN. Well, I would say that we were—contributed to the defeats of George McGovern, Frank Church, Birch Bayh, John

Culver, Walter Mondale, Howard Cannon, Gaylord Nelson. Quite honestly, most of the class of 1980.

The CHAIRMAN. When people say that negative campaigning does not work, they are clearly wrong, are they not?

Mr. DOLAN. It works sometimes, and it does not work other times. It is very simple. I mean, I think some of the best commercials we put on in many cases have had little impact on people. They would say, yeah, we know that, and we do not care.

The CHAIRMAN. But you do think you are an effective organization?

Mr. DOLAN. Yes.

The CHAIRMAN. And you do think that you have some wins to your credit?

Mr. DOLAN. I think we have been helpful in forwarding our philosophy just as I think the AFL-CIO's COPE has been helpful in forwarding their own philosophy.

The CHAIRMAN. OK. I have some more questions, so we will have a second round. Senator Ford.

Senator FORD. Mr. Chairman, I will let you have most of my time, but Terry, let me ask you this. I do not quarrel with the content. I do not object to that. And my record is here, and I have to live with it, and I understand that very well.

Is your problem with the candidate or opposition saying it himself or herself? Is that a problem that would eliminate your independence as an independent PAC?

Mr. DOLAN. No, that is not a concern at all. It is the result of these election laws. There is no question about that. But the election laws provide that NCPAC, if it wanted to support a candidate for the Senate in California, it could only give him $5,000 directly. If we wanted to run a campaign in his behalf, we can spend whatever we raise so long as we follow our own limitations of $5,000 contributions to us.

The reason that is necessary, Senator, is that in most cases we attack the record of incumbents because we believe you guys have an unfair advantage. You have your magical computers, you have 6 years of free press, you have staff, which you use to run a free election, you have mailing permits, and all this other nonsense which the Americans for Demoratic Action admitted—excuse me, did not admit, they put out a very dramatic study which said the average Member of Congress was spending about $350,000 a year of government money running for relection.

Now, that was in 1978, I believe, so I am sure it is much higher than that. So, all these things coupled together, we thinks that gives incumbents huge advantages. Challengers usually do not have that much money to raise attacking the incumbent's record, so we do that for them. It is as simple as that.

Senator FORD. I have found that very few incumbents were short on funds.

Mr. DOLAN. That is correct. They infrequently are.

Senator FORD. So they usually have a sufficient amount of money to mount a campaign, and there are advantages to being a nonincumbent because today somebody would announce against you, and you are the incumbent. You are here trying to do your duty, and that opponent is there every day doing something to you, and without a record to run on. So there will be advantages there.

I have to take that lick when it comes. The only problem I have is that some Madison Avenue slick does it for him, and I guess we have the opportunity to slick it out, but what I would like to see both of us make statements in our own voice and saying it ourselves. That puts us basically on the same level. You could still use whatever you wanted to as long as that candidate said it, but again, I just want to get back to the problem of the legal connection.

If he said he could not say it on your ad, though—could he?

Mr. DOLAN. No, we could not use the candidate at that point.

Senator FORD. You could not use the candidate, so that would eliminate your ability to, if this bill passes, be helpful to your candidate and harmful to your opponent. That would be the only thing that would——

Mr. DOLAN. It would, but first of all I address my comments to the other part of the bill, which would require a candidate to appear in a commercial, but in fact let me state the record a little bit more clearly.

On that one question you asked, it is possible that we would not be able to put our commercials on the air, but not necessarily true, and let me tell you why.

We do a number of things in every election cycle which again nobody knows, very few people know about. Before we put a commercial on the air, we will send it to the person whose record we are attacking, and if he finds something inaccurate about it, we will not run it. We provide documentation to the station well beyond what they have requested. We have offered to indemnify the stations for libel, slander, personal attack, and response time, all of those items.

Finally, in the places where we have been most successful, it has been relatively small States where television advertising is not a great deal to speak of. We would be more than happy if this bill were passed to let the other guy have response time, and why is that? People do not believe it.

The CHAIRMAN. Let the other guy have what?

Mr. DOLAN. Response time, so assuming we went into South Dakota, for example, and attacked Senator Pressler for—I do not know what you have done that our contributors would be mad about, but I am sure we could find something. Let us assume that it was against the balanced budget amendment. We would put on a commercial saying, "Vote agains Larry Pressler because he voted against the balanced budget amendment." I do not know if he did or not.

We would be delighted to have Larry Pressler come on with free response time and say, no, no, no, because we wanted to talk about his record. Now, that is NCPAC. That is not the other groups. That is not the mom and pop organizations that independent expenditures would apply to as well.

In fact, this bill, like all the other reforms, could indeed help NCPAC by shutting up all the less expensive voices and permitting us to go ahead.

Senator **Ford**. Well, Mr. Chairman, I have no quarrel with your position, and I have no quarrel with the content of whatever anybody wants to say. It is fair game. You are out there in the arena, and the only proposal I would think would have some meaning here would be just that both candidates if they are going to say something about the other one, that they would appear on the commercial themselves. That is the only thing. And I understand where you are coming from, as it would be difficult for you then to do your particular thing, if I can use that term, if the candidate had to appear.

The **Chairman**. That would apply to his commercial. The appearance of the candidate would not apply to the independent committee.

Mr. **Dolan**. They would just keep us off the air under any circumstances.

The **Chairman**. No.

Senator **Ford**. I do not understand that either.

The **Chairman**. You can go on the air and run anything you want. It is similar to the political editorial rule. The candidate against whom you run gets free time to respond.

Mr. **Dolan**. OK. That is in fact the same thing, Senator, because what is going to happen is, no station is going to be willing to sell unless they get all those guarantees. We can give those guarantees. Nobody else, very few others can, including, by the way, the Republican Senatorial Committee, the Democratic Senatorial Committee.

The **Chairman**. I am not going to follow up now, because there are other Senators with questions, but we will pursue it later.

Senator Pressler.

Senator **Pressler**. Let me ask a question. I note that you quote the *CBS* v. the *Democratic National Committee* case and the *Red Lion Broadcasting Co.* case, which both very much come down on the side of not restricting things, and you have given a couple of case examples, but let me give you a case example and see how you would analyze it.

Let us say that a State legislator was running for Congress and a third party group ran an ad saying that he had attended only 50 percent of his committee hearings in the State legislature. The State legislator was not well financed, but the third party out-of-State group was well financed.

The truth of the matter was that the State legislator's attendance was almost perfect, but the way the 50-percent was arrived at was taking all the subcommittees on the committees on which the State legislator served. So in a technical sense the 50 percent statement is true, but it is highly misleading and unfair.

Now, how would this candidate respond? Then let us say the candidate's opponent said those ads were outrageous, which was quoted in one little newspaper somewhere, so the candidate could not blame his opponent. Most of these races are mostly conducted in the media anyway. He could call a press conference, but as perhaps you have found on some occasions, and I have found on many occasions, what you say might get printed one place here or there, but there is not really a public awareness of it. How do you instill fairness in this situation?

Mr. **Dolan**. Well, I wish you would give a more likely hypothetical.

Senator **Pressler**. That is a very likely hypothetical.

Mr. **Dolan**. No, it is incredibly unlikely.

Senator **Pressler**. Why would that be?

Mr. **Dolan**. Because the stations would not run that commercial. If we said vote against Barry Goldwater because he is too liberal, no station with any responsibility would run it. And that is their choice to do so.

Senator **Pressler**. What about his committee attendance in the State legislature?

Mr. **Dolan**. That is my point. What you said is, let us assume you take something grotesquely out of context, not that is false, but that is grotesquely out of context. Most broadcasters would not run that.

Senator **Pressler**. Well, I have seen this particular ad run.

Mr. **Dolan**. By whom? Not by a third party candidate—not by a third outside——

Senator **Pressler**. Essentially, yes. I would have to double check it. But why could this scenario not occur?

Mr. **Dolan**. It might occur. It is not likely to occur.

Senator **Pressler**. Technically, if the quotation being given is true you could not sue somebody on it, but it is highly misleading. I mean, let us say for example that at this very moment there are two other of my committees meeting, and I am here.

How would you deal with that one in terms of the cases that you have cited? Just give me some analysis of it. Let us say it did happen.

Mr. **Dolan**. First of all, let me presume your hypothetical is true. It is not, as far as I know, and it would not likely occur except with stations that are so desperate for advertising that they might take something that they know is kind of questionable.

Senator **Pressler**. You mean attendance records? Stations will not take ads on legislators' attendance records?

Mr. **Dolan**. Our experience has shown that when we go in, if we went into that commercial, they would say let us see the documentation for that.

Senator **Pressler**. And you could provide it?

Mr. **Dolan**. No, you really cannot because in fact what you would have is an indication that a 50-percent attendance record was pretty good. That is your own hypothetical, right?

Senator **Pressler**. That is right. It is probably very good. Like this morning I have a 33-percent attendance record, which I think is pretty good.

Mr. **Dolan**. In hearings.

Senator **Pressler**. In hearings.

Mr. **Dolan**. Now, if that fact were brought to the attention of television and radio stations, they probably would not run it.

Senator **Pressler**. That is not right. We saw ads in here that were run in the last senatorial campaign.

Mr. **Dolan**. By whom? By candidates. Candidates have a complete and total freedom to put whatever they want on the air, not by independent groups. Independent groups do not have that right. We have got to fight like cats and dogs to get on the air.

Senator Pressler. We saw some on Senator Percy that were like this. I believe they were put on by an independent group or person.

Mr. Dolan. I would be shocked if they were put on.

Now, let me be perfectly honest. I do not think there is any question that NCPAC has a higher standard of proof, I think, than most groups do.

Senator Pressler. Those ads in Illinois were not run then?

Mr. Dolan. Again, if they were a misstatement, a misrepresentation of his record——

Senator Pressler. You very skillfully got me talking about other things. Let us say a station ran it. A station could run it. You will not address the hypothetical.

Mr. Dolan. I will address it.

Senator Pressler. Let us say the station runs the ad. Everything I say could happen under our present laws, under the *Red Lion Broadcasting Co.* case, as far as I read it.

Mr. Dolan. OK, the response to that is yes, everything you said could happen. It is not likely to happen, but it could.

Senator Pressler. Let us say it did.

Mr. Dolan. As a matter of fact, it happened pretty close to that in North Carolina.

Senator Pressler. Address my hypothetical.

Mr. Dolan. I am going to by telling you what actually happened. In North Carolina, Senator Helms and Governor Hunt said things which I think were arguably distortions. You know what they did? They ran more commercials saying the other guy was distorting their record. It is a legitimate responsible reaction.

Senator Pressler. That is not my hypothetical.

Mr. Dolan. When we ran that newspaper ad about Senator Church, we got unmitigated hell from everybody for doing it, and we were wrong.

Senator Pressler. You do not want to address my hypothetical.

Mr. Dolan. I am addressing it. I am saying if that ever happened, the public, an informed public, the candidate, a Senator who has hundreds of thousands if not millions of dollars——

Senator Pressler. This is a State legislator. He has not got a big campaign chest. I gave you the hypothetical.

Mr. Dolan. It was attacking the State legislator. OK. He does not have the money to respond. The media is there supposedly doing its job, and when a candidate like Senator Schmidt was accused of distorting his record, the media made a big deal about that, so you presume people are stupid, Senator. I do not.

Senator Pressler. No.

Mr. Dolan. Yes, you do, because you imply—you think of crazy hypotheticals which might happen, that might happen, but in fact, your candidate, you will probably do that or your opponent will probably do that next year in distorting a record. You are going to be upset about it. That is democracy. That has occurred for 190 years or whatever it is, and we are doing just fine without these laws, trying to silence people who do tell the truth.

Senator Pressler. Well, in my hypothetical I said that both the legislator and his opponent disowned the ads, and it was reported, but if you run those ads every night for 3 weeks, the media does not really count for much in a lot of races, very frankly. Maybe that is bad. But in this race they did not make a big deal of it.

But that was the hypothetical I presented, in terms of how you would decide a case similar to *Red Lion Broadcasting Co.* You may want to respond to it further on the record, because I would like to see that one responded to right on point.

You know, when you are dealing with a set of facts, you have to deal with them, and we deal with real situations, and I think this is one. That is part of the problem. I do not know what the solution is exactly, but I would like to get your solution at some point.

Mr. DOLAN. Well, as I said, I would permit the ads to go on if the broadcasters wanted to do it. If the ad was in a newspaper ad, you have no—this bill does not solve that. If it were in a direct mail piece it would not solve it; if it was in a door-to-door campaign.

Senator PRESSLER. In the hypothetical it was on TV.

Mr. DOLAN. I understand that, but my point is, assuming this bill were passed, you would not only silence that commercial, you would silence every other commercial that were true.

Senator PRESSLER. You would not silence it. You would give the guy a chance to respond.

Mr. DOLAN. Well, in fact, you would silence the very stations that will be willing to play the game with response time, or very few people making the attacks are willing to pay the money.

The CHAIRMAN. We are going to have a second round for anybody that wants to ask other questions. Senator Kasten?

Senator KASTEN. Mr. Chairman, I have no questions at this time. I might want to put in some questions for the record.

The CHAIRMAN. Senator Gorton?

Senator GORTON. Mr. Dolan, I do not often agree with NCPAC's particular campaigns. I think there is, however, some considerable force and persuasiveness on the part of some of the arguments that you make here. I believe that your answer to Senator Pressler was at least 50 percent or more correct. It is a point which is also made in your written testimony to the effect that the initial response of a television station offered such advertising when the requirement was that it grant free advertising to the object of the advertising would be to say no to you.

I am not sure that is 100 percent of the answer. Maybe you will comment on this. If I were managing the television station and felt that I could do it, I would say, sure, I will be happy to sell you that at NCPAC, but you will pay double for it, so that in effect I am being paid for both sides.

First, do you think that would happen, and second, do you think that that would increase the fairness of the campaign and the knowledge received by the voters, the viewers of that television station?

Mr. DOLAN. Let me respond to your first about being 50 percent correct. I did not mean to imply that if that hypothetical occurred it would be the greatest thing for democracy. I do not imply that at all. In fact, if a distortion of a Senator's record gets on the air, that is——

Senator GORTON. I am not speaking about distortions. I am speaking about Senator Danforth's bill.

Mr. **Dolan**. But Senator Pressler's example, that would not be good. Now, my response is, I do not think it is very good when there are 34 Senators up for reelection every 2 years and every single one of them says they are fighting the deficit. That is nonsense. Some of them ain't telling the truth, but they go out and they say it over and over again, and it gets on the air. That is unfair, too.

I do not think the Constitution was intended to preserve fairness. It was intended, at least this section was intended to benefit the people, and that is why the court has said time after time after time that the purpose of the first amendment is to afford as broad a discussion of public issues as possible, so, yes, Senator Pressler makes a point that to do that——

Senator **Gorton**. Really, with all respect, I am not interested in your answer to Senator Pressler. I would like you to answer my question.

Mr. **Dolan**. Your second question was?

Senator **Gorton**. The impact on the television station would simply be that it charged you double and offered the other side an opportunity, which presumably would increase the knowledge of the viewers.

Mr. **Dolan**. I think that would be found unconstitutional. It would be bad for constitutional reasons and bad for policy reasons, the Constitution clearly because it would be stifling a statement—in 99 percent of the cases a truthful statement—not based on what it was but based on who made it, and that is—the court has said over and over and over regulations that discriminate against certain voices in behalf of others are unconstitutional.

That was the *Buckley* v. *Valeo* case. That was the *NCPAC* v. *Federal Elections* case. On policy grounds it is even more dangerous.

First of all, as I said, if we went into Sioux Falls, SD, and bought a saturation buy of $20,000 and we were charged $40,000, we could afford that. We could do it, and it would serve our purposes to get Senator Pressler discussing our ads. That serves our purposes. Now, could the Americans for Democratic Action? Probably not. They do not have any money compared to what we have. We are the largest PAC in the country. In fact, it would in most cases have a direct opposite effect.

So, I think it is not particularly good for that reason, and lastly, it would cut off truthful information. It would decrease accountability about that Senator's record.

Senator **Gorton**. All right. You went on to say that primarily in the case of NCPAC, at least, you are addressing an imbalance because you are attacking incumbents. Is that universally true? Did you not participate at all, say, in the North Carolina Senate race?

Mr. **Dolan**. No; we did not. Excuse me. I believe we made a contribution to Senator Helms, but we did not, Senator. That is why I get so frustrated when I hear virtually anything the Congress is doing. I say it is redressing an unfairness. That is my right to say it, and it is your right, everybody's right to disagree with me. When it becomes dangerous is when the Congress gets in the business of deciding what is fair and unfair, and passing it into law. So, yes, I agree.

Senator GORTON. My time is about out, so I want to ask one or two other questions. That was really just setting the ground. What happens under those circumstances? Do you think there ought to be any rights on the part of your beneficiary to say that he does not want you in the State, whether you are addressing an imbalance or not? And how would you react to the proposition that if in fact because you can spend an unlimited amount of money in a given State while the incumbent or whoever you are attacking is limited to $1,000 to $5,000 per source, that the automatic response to independent expenditures above a certain amount would be to remove the limitations on contributions to the other candidate, to the candidate who is attacked. Would you object to that?

Mr. DOLAN. Yes, I would. Let me give you another one which I think is unfair.

Senator GORTON. So outsiders would have total and unlimited right to freedom of speech, but the candidates nonetheless should be limited in what they can do except with their own money?

Mr. DOLAN. No; they should not. You, Senator, I think—I do not presume the people of Washington State are ignorant. I do not presume that if you took $500,000 from organized labor, that they would say, is that not sweat of organized labor? They would know that you are going to vote the way organized labor wants to vote. It is a dramatic demonstration of what your record will be.

That is good for the country, so I believe in lifting all limitations, and by the way, the Helms-Hunt race was a good illustration. In fact, they did not have limitations. It was a $26 million race, or whatever it was, the most incredible amount of money, and democracy, if anything, is better off in North Carolina. More information, more voter registration, more voter turnout.

Senator GORTON. So then your answer to my last question is in the affirmative, that it is perfectly appropriate if you are to have this absolute right to communicate that the person against whom those communications are aimed should have a more unrestricted right than he does at the present time to get the wherewithal with which to answer?

Mr. DOLAN. So long as you do not limit anybody else, I agree, yes. A lot of people presume too much money is spent in politics. Again, I think that is nonsense. Not enough is spent in politics. We spend more on the single sale of fireworks on the Fourth of July than we do on electing a Congress. I think that is pathetic, and polls show that.

Senator GORTON. You did not answer my question as to whether the beneficiary of your advertisement should have a right to cut you off.

Mr. DOLAN. I would be opposed to only permitting the person attacked to have his limits raised. Everybody should be able to raise what they want to raise and spend what they want to raise.

Senator GORTON. You did not listen to my question.

Mr. DOLAN. OK. One more time.

Senator GORTON. When you are in a general election, you have two candidates. You are attacking one of them. The candidate who is benefitting from those things may feel hurt by it because you are in his State and he really does not want you there. He would rather run his own campaign. Should he have any right to control what you are doing for his benefit, to co-opt you, for example, and subject you to the limitations of $5,000 on his behalf?

Mr. DOLAN. No.

Senator GORTON. Why not? Then you are not redressing an imbalance.

Mr. DOLAN. First of all, I am talking about the Constitution as well. Again, my personal opinions about the imbalance are my personal opinions. We can argue that all day, because it is unconstitutional. You cannot violate somebody else's first amendment rights by doing something yourself.

That is not in the purview of the first amendment, and I am sure if I were up on my constitutional law, I could cite some cases for it, but I frankly did not expect that response. If you are looking for—I am looking for the widest possible discussion of the issues. I do not recall anybody in this room, by the way, ever making a comment about the impact, the indirect impact of this bill.

Organized labor spent anywhere from $20 to $100 million trying to elect Walter Mondale to the Presidency in 1984. They probably supported your opponent and most of the people up here spending, I do not know, $50,000, hundreds of thousands, millions of dollars. You do not even know about that, that alone it would not have any impact. You do not even know how much was spent by organized labor.

So, what this does is, it would silence all our voices, and therefore make the voices of organized labor and those people who choose to express their first amendent rights in other ways more powerful. That is unconstitutional.

The CHAIRMAN. Well, here is my view on the balance question. I think that there is no balance in the system now for a different reason than you do. I think there is no balance in the system because, first of all, the law has created a stacked deck, and it is stacked in your favor. It is stacked in the favor of the independent political action committees.

Why is it stacked in your favor? It is stacked, first of all, because under the law an individual is limited in making a contribution to a candidate's campaign to $1,000 an election. The same individual or a different individual can contribute $5,000 a year to NCPAC, $1,000 to a candidate's election, $5,000 a year to NCPAC.

Second, a political action committee can contribute $5,000 to a campaign, but a political action committee can spend an unlimited amount of money on so-called independent activities. This means that we have doubly stacked the deck. We have created an imbalanced situation in which individuals have higher limits on contributing to NCPAC than they do on contributing to Joe Dokes' campaign, and the political action committee has a very strong incentive not to work through the candidate's campaign, but to enter the campaign as an interloper, and I think that that creates a lack of balance.

There is a second question on balance, on fundamental fairness. You know, I think every child who is raised in this country learns while growing up a basic little comment on fairness. That comment is, no fair two against one. No fair two against one. Every child is taught that while growing up. No fair two against one.

I was, and so were people who were raised in the State of Washington or South Dakota or wherever. Everybody is taught, no fair two against one. Now, it seems to me that when you have a political campaign candidate X running against candidate Y, and then all of a sudden in the last few weeks of the campaign somebody else comes in from out of the blue and piles on, that violates a basic premise, and the other candidate should have a right to respond.

I do not agree that it is shutting off debate or stifling debate, as you have put it, to provide for an equal time to respond. As a matter of fact, if a television station runs an editorial against a candidate, that candidate against whom it is run has an automatic right to respond, free time.

I do not understand why NCPAC should be able to play by a different rule than a television station. So, those are my views on balance. I have heard your views on balance. You might like to react to what I have said.

Mr. DOLAN. I would, actually, because your viewpoint on balance, I think, is just—well, at least one-sided, which I think has kind of marked the way these hearings have been handled.

The reason independent expenditures are in the law, Senator, is because the U.S. Supreme Court—the original campaign law outlawed independent expenditures in excess of $1,000. The Supreme Court said it is a constitutionally protected right. You are here to uphold the Constitution. And based on that, I think you ought to give a little bit more consideration to one thing which you have not talked about, and that is the truth.

In 99 percent of these cases, these third-party ads speak the truth, and you want to shut them up. That is what this bill is trying to do.

The CHAIRMAN. That is absolutely not what the bill is about. The bill is to provide a fair chance to rebut or to answer.

Mr. DOLAN. Senator, we have gone through this again, but you know the impact of this bill, I am sure, because you have discussed it with people, and broadcasters have said they will not run these commericals if they are required to do it. So, it will indeed shut them up.

Secondarily, about the deck being stacked, that is simply inaccurate. In every single case in 1980, every single case in 1980, if you took the money that NCPAC spent and that the candidate we were supporting spent and totaled it up, we spent less than the incumbents we were attacking, so I think this thing about two against one is ridiculous. It just does not hold water in its analysis.

The reason those higher PAC limitations are in there is that the Republican Party can give to its candidates hundreds of thousands of dollars, and does, beyond the limitations, and the Democratic Party does to a lesser degree. Is that an imbalance? Yes, it is. It favors parties. Should it be gone from the law? It sure should. You seem outraged by the $1,000 limitation to a candidate.

I agree. I think that is wrong, but not because it helps a candidate relative to a PAC, but because that is that individual's expression of his first amendment rights, and if he chooses to do it in a $100,000 independent expenditure, or he chooses to do it in an or-

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ganized labor campaign, to go door to door, or he chooses to give John Danforth $100,000, I believe he ought to have that right.

Now, will it be unfair if candidate A gets and raises $500,000 and candidate B gets nothing? Yes, it will. But in certain respects that says something about candidate B if he can't get anybody to help him.

Let me just make the last point about the editorial. Again, you are missing what I think is a critical factor. One editorial will not decide an election. I think it is wrong, by the way, for editorials to be forced to reply. They should as a responsibility to the community, but I do not think there should be any law requiring that.

So instead, a newspaper runs an editorial there is no right to reply there. If a candidate puts the editorial in direct mail, no right to reply there, because we have recognized that that would violate the first amendment. And why we do not accept that same analysis for electronic media, I do not know.

The CHAIRMAN. I think we have realized the special power of the electronic media. I think it is unparalleled, the fact that the electronic media has raised to the nth degree any previous concept of dirty politics. The state of political campaigns now with the 30 second TV commercial makes the campaign against Grover Cleveland look like child's play.

This is a whole new era of dirty politics.

Mr. DOLAN. If you are looking for righteous indignation, then I suggest you look at your last commercial, which treats the voters like idiots. Would you run that commercial again? That commercial was garbage. It implied that you ought to be elected to the Senate because you knew how to play with your kids. Now, that is an insult to the voters of America.

The other commercials you ran, I think they performed a service. They told Harriet Woods' record.

So if you are looking for righteous indignation, outlaw commercials which market candidates like they are bars of soap.

The CHAIRMAN. You can outlaw emory boards, matchboxes. I mean, under that theory you can outlaw people going out and shaking hands on street corners.

Mr. DOLAN. That is correct.

The CHAIRMAN. I think that is a ridiculous proposition.

Mr. DOLAN. Of course it is. It is just as ridiculous as this bill.

The CHAIRMAN. I will tell you what is corrupting the political process. What is corrupting the political process is the 30-second commercial where you can do a hit job. What is especially corrupting is when an interloper, unaccountable to anybody at all, can come in in the last 3 or 4 weeks of the campaign, run something allegedly without the consent of the person who is the beneficiary of it, and does so. And from a practical standpoint, the person against whom it is run cannot respond.

And from a practical standpoint, the reason why the person cannot respond is that in the last month of the campaign, how are you going to raise in $1,000 maximum increments enough money to go on the air against some of the stuff that you have run?

Mr. DOLAN. So you would be against organized labor hypothetically, if the Constitution were not in your way?

The CHAIRMAN. I am asking the questions.

Mr. **Dolan**. Well, then let me draw a conclusion from your statement. You, it seems to me, would be willing to shut up every voice.

The **Chairman**. I am not shutting anybody up. I am just saying let us have a fair chance to respond.

Mr. **Dolan**. Well, again, you know what that would mean. You would cut off any type of discussion through the media.

The **Chairman**. Baloney.

Mr. **Dolan**. The U.S. Constitution, the first amendment was not made for you and your colleagues. It was made for the voters, to increase as much discussion as possible. And what this bill would do is stifle a great deal of it, and you know it is true.

The **Chairman**. No.

Senator Pressler.

Senator **Pressler**. No.

The **Chairman**. Senator Gorton.

Senator **Gorton**. No further questions.

The **Chairman**. Thank you, Mr. Dolan.

Mr. **Dolan**. Thank you.

[The statement follows:]

STATEMENT OF JOHN T. "TERRY" DOLAN, CHAIRMAN, NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE

Under our current federal election compaign system, candidates for federal office are restricted as to the dollar amount of contributions they may accept from independent sources. Due to the high cost of funding elections and the importance of the election of persons representing the public in our government, there has been an increase in independent political activity associated with federal campaigns. One such organization is the National Conservation Political Action Committee, a nonprofit, non-member corporation established in 1975.

The National Conservation Political Action Committee (hereinafter "NCPAC") was formed to provide direct and in-kind support to conservative candidates of both parties seeking election to federal, state and local offices. NCPAC offers support to candidates in three different ways. The first two are forms of direct support, consisting, subject to the $5,000 limitation, of contributions to particular candidates' campaigns and "in-kind" contributions in the form of candidate training schools, the organization of fundraising events and other support activities. The third way in which NCPAC assists candidates is in the form of independent expenditures. The organization is not limited to the amount it may expend independently in support of a candidate, so long as the expenditures are not made in consultation or coordination with a particular candidate for federal office. In fact, NCPAC has become the leading independent political organization in America which supports candidates through the use of independent expenditures. NCPAC has, in furtherance of its objectives, utilized the media extensively to support and to oppose candidates for office. Generally, the advertisements produced by NCPAC in opposition to particular candidates have focused on the past voting records of incumbent candidates. These advertisements are designed to inform the public on how the candidate actually stands on issues of significant public importance. In the 1984 election cycle, NCPAC spent $10,243,753.00 in independent expenditures, of which $406,173.00 was spent in opposition to federal candidates.

Since its organization in 1975, NCPAC has become the largest independent political action committee in the United States in terms of contributor base, gross receipts and independent expenditures. The organization plays a leading role in supporting federal candidates for office and utilizes broadcast stations extensively for the airing of its advertisements. The effect of the legislation pending before this Committee could have a devastating effect on the continued activity of NCPAC. Therefore, on behalf of NCPAC, its contributor and supporters, the following statement outlines our concerns and viewpoint on S. 1310.

Senate Bill 1310, entitled the Clean Campaign Act of 1985, was introduced by Senator John Danforth to forbid the use of negative-attack advertisements in campaigns for federal office. The bill has two provisions which would amend Section 315 of the Federal Communications Act. The first concerns activities by federal candidates and their authorized political committees. This provision requires the personal appearance of a federal candidate in any television or radio broadcast in which he intends to refer, in any manner, to his opponent for the same office. If the federal candidate is permitted to broadcast an advertisement in which he does not appear and in which his opponent is referred to, the broadcast station must offer free response time to the opponent referred to in the broadcast.

The second provision of S. 1310 addresses the area of independent political activity in federal campaigns. If a broadcast station permits the airing of any materials by any individual or organization, other than a federal candidate or his authorized committee, which either endorses or opposes a federal candidate, the station must offer free response time. If the advertisement opposes a federal candidate, then the broadcast station must offer free response time only to the particular candidate fetured in the broadcast. However, in the case of an advertisement endorsing a federal candidate, the broadcast station must offer free response time to any other candidate opposing the endorsed candidate.

There has been a substantial amount of discussion of late concerning the electoral process. A number of Senators and Representatives have contemplated, and have even introduced proposed legislation, to change the election process for federal office. However the discussions have generally surrounded the problem of the high cost of funding for campaigns in federal elections and the need to decrease the cost, not only for incumbents, but also to permit challengers a fair chance at federal offices. Although Senator Danforth, the sponsor of S. 1310, could argue the bill's main purpose is to decrease the cost of campaigns for federal office, he never even mentions this fact. Rather, he suggests the motivating force behind S. 1310 is to curtail the use of negative campaign advertisements in federal elections. Senator Danforth clearly stated his objection to negative political advertisements, as follows: "Negative campaigning has always existed in American politics, but the advent of television commercials and political action committees has blown it into previously undreamed of proportions" [1] According to Senator Danforth, "Negative political campaigning is creating apathy and cynicism among the voting public, and [is] distorting our electoral process.[2] Senator Danforth claims the Clean Campaign Act of 1985 is intended to increase a candidate's "Accountability" when he uses negative campaign advertisements by requiring the candidate to appear "in person". Additionally, Senator Danforth freely admits his objection to independent political activity: "Independent political action committees and wealthy *interlopers* are free to inject themselves into races, as well. These PACs may have no loyalty to a district or a state, a candidate, or a party. Nonetheless, they can spend thousands of dollars on negative ads.[3] Accordingly, Danforth states that S. 1310 attempts to achieve some "balance" in federal campaigns in which independent ads are aired.[4] However, S. 1310 goes far beyond merely restoring some "accountability" and "balance" to federal election campaigns.

Currently Section 315 of the Federal Communications Act, while granting legally qualified candidates the right of equal opportunity in federal elections, does not grant candidates the right to respond to an opponent's paid broadcast with a free broadcast. The reason behind the doctrine of equal opportunity is the nonsubsidization philosophy underlying Section 315. As stated in *Carter/Mondale Reelection Committee, Inc.*, 81 F.C.C. 2d. 409, 416-17 (1980), "For better or worse Congress did not ask broadcasters to equalize the resources available to candidates to buy air time and for other election purposes. Instead, the primary concern of Section 315 is merely to assure that broadcasters do not discriminate in providing opportunities to purchase broadcast time to advocate their respective candidates." In practice, past Federal Communication Commission decisions have reiterated in the political process. Neither Section 315, nor legislative history leading to its adoption, indicate any Congressional intent to impose on the political process the kinds of obligations set forth in S. 1310.

By definition, independent expenditures by political action committees are made without the cooperation, consultation or request of any federal candidate. 2 U.S.C. 431 (d). Since the express purpose of political action committees is to influence the outcome of candidates' elections to federal office, application of this Bill would serve only to bring about the very subsidization of candidates which Congress sought to avoid in Section 315. As the Commission stated in *Letter to Nicholas Zapple*, 23 F.C.C. 2d. 707, 708 (1970), when supporters of candidate A have purchased time, it is our view that it would be inappropriate to require licensees to in effect subsidize the campaign of an opposing candidate by providing candidate B with free time. Since Senate bill 1310 would have the effect of requiring broadcasters to subsidize federal candidate's campaigns, the intent of Congress in enacting Section 315 would be radically repudiated.

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[1] Statement of Senator John Danforth on the Clean Campaign Act of 1985, June 17, 1985.

[2] Id.

[3] Id. (Emphasis added).

[4] Id.

Freedom of political expression is a fundamental right protected by the Constitution. As the Supreme Court stated in *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957)):

"Discussion of public issues and debate on the qualification of candidates are integral to the operation of the system of government established by our Constitution. The first Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people"."

Discussion of political campaigns and the expression of political ideas in a federal campaign setting is an associational activity equally protected by the First Amendment. The First Amendment guarantees "freedom to associate with others for the common advancement of political beliefs and ideas". This freedom encompasses "[the] right to associate with the political party of one's choice" *Buckley* v. *Valeo*, supra at 15, (quoting *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975)).

In a case in which NCPAC was victorious, the Supreme Court clarified the fact that the guarantees of the First Amendment apply equally well to political action committees:

In a case in which NCPAC was victorious, the Supreme Court clarified the fact that the guarantees of the First Amendment apply equally well to political action committees:

"We also reject the notion that the PACs form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in this case. [The PACs] are mechanisms by which large numbers of individuals of modest means can join together to 'amplify the voice of the adherents'." *Federal Election Commission, et al.* v. *National Conservative Political Action Committee, et al.*, 84 L.Ed.2d. 455, 468 (1985).

The First Amendment protects freedom of speech. This includes not only the licensees' right to broadcast but the general public's right to hear diverse political messages. These constitutionally guaranteed rights would be torn asunder by the passage of Senate bill 1310. Instead of encouraging free speech, the so-called Clean Campaign Act of 1985 would act as a penalty to broadcasters for providing air time for political advertisements by independent political committees. Broadcasters are reluctant to sell air time to a political entity under the current regulatory scheme. The aftermath of passage of S. 1310 would be the total refusal by broadcasters to air advertisements other than a candidate's authorized committee, because they know they may have to provide free time to a candidate or several candidates under the second provision of S. 1310.

Any legislation which concerns the regulation of political expression and the ability to exercise the right of free speech through restrictions must serve a compelling governmental interest. Are the disadvantages of so-called negative advertisements so compelling a governmental interest to result in legislation like S. 1310 which, in essence, results in the inability of independent political groups to broadcast their views? I seriously doubt that the motivating force behind S. 1310, as articulated by its sponsors and supporters, would be deemed a sufficiently compelling governmental interest. The Supreme Court in *CBS* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969)), stated that the purpose of the First Amendment is to open the marketplace of ideas to the free flow of information:

"It is the right of the viewers and listeners, which is paramount . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial. That right may not constitutionally be abridged by Congress."

Any limitation on broadcasting content reduces the public's access to information. Senate bill 1310 goes beyond merely limiting broadcasting content; it, in fact, results in the inability of any independent person or organization to broadcast its opinion or viewpoint. As a result, I predict that, if Congress goes forward with this ill-conceived proposal, it will be immediately repudiated by the Judiciary.

Senator John Danforth's Clean Campaign Act is a cynical, unconstitutional attempt to regulate Free Speech and to protect incumbent politicians from criticism.

Danforth's bill would force privately owned television stations to give free air time to any candidate attacked by his opponent, when that opponent was not featured in the commercial. Even worse, it would force stations to give free response time if they sell ads to independent groups endorsing or attacking the record of a candidate. In the course of most political campaigns, an "attack" is usually the person out-of-office criticizing the public record of the candidate who is in office. This, Mr. Danforth calls a threat to Democracy.

If the founding fathers meant for the First Amendment to do anything, surely they intended it to enable Americans to criticize their public officials.

In fact, criticism of public officials is what this bill really intends to stop. Incumbent politicians become uncomfortable when a group, or an individual, talks about their records.

Danforth's bill is nothing more than an incumbent insurance plan, designed to further insulate members of Congress from having to be confronted with the troublesome problem of facing the voters.

Not only do incumbents, like John Danforth, have available hundreds of thousands of dollars worth of taxpayer funded perks and all the advantages of raising money as incumbents, Danforth now wants to shut up all forms of discussion about his, or any other incumbent's, voting record. It is wrong, it is unconstitutional and it is a disservice to the voters of America.

Mr. Danforth claims ads attacking a candidate's record are creating apathy. Rubbish. He cites nothing to support this preposterous notion. If anything, negative ads increase voter interest because they give information to the public the media does not give. In the 1984 North Carolina Senate race, a record was set for the most expensive and negative campaign in American history. But instead of a lack of voter interest, North Carolina had a record increase in registration and voter turnout.

Americans have a right to know where candidates stand on the issues. In fact, during the 1982 campaign, John Danforth ran commercials "attacking" his opponent, which, if his bill were law, would have been illegal.

Putting aside the hypocrisy of Mr. Danforth's "Stop me before I kill again" philosophy, the issues he used (taxes, the deficit, Social Security) are all important topics. The voters in Missouri has a right to know Harriet Woods' (Danforth's opponent in 1982) positions . . . and Danforth had the right to tell them.

In summary, elections are for debating issues and the qualifications of the men and women we entrust to run our public affairs. More public debate, not less, is needed. Voters need more information, good and bad, about politicians; not less.

What Danforth and his colleagues who support this legislation call "negative campaigning" the rest of us call Democracy. Mr. Danforth hinted at the real reason behind his bill when he said, "There is a sense of fear here that, when we face reelection, our opponents will use negative tactics against us." Of course, he is right. But shouldn't Senators have to defend *every* vote they make in Congress, or is Danforth proposing we not hold him accountable for his record?

What kind of commercials would we see if John Danforth's bill becomes law? Our airwaves would be filled with commercials similar to another ad Senator Danforth ran. It shows Senator Danforth rolling around on the floor playing with his children. An announcer comes on and intones, "Jack Danforth knows at least four Missourians who'll be living here long after he's finished serving in the Senate. So when he talks about making our system work for the future, he's not kidding. John Danforth for the Senate. For Missouri—Danforth." That's it.

Not only is this type of commercial totally lacking in information about what the Senator will do in Washington; it is an insult to the intelligence of the voters. John Danforth and his colleagues want to market themslves like bars of soap. If Mr. Danforth is looking to make any political commercials illegal, these are the ones.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS

Question. Do you support the Fairness Doctrine and the Equal Time Rule? Do you believe they are constitutional?

Answer. The Fairness Doctrine and Equal Time Rule should be abolished for three reasons:

First, as a practical matter, the two rules limit rather than expand public debate of controversial topics of public importance. Broadcasters, preferring to avoid legal thickets, simply avoid airing controversial points of view.

Second, since these rules are not well defined, broadcasters can use these two doctrines to justify the deliberate censorship of information.

Third, taking a strict view of the First Amendment, both are clearly unconstitutional.

The free market and public pressure are the best tools to prevent abuses by broadcasters.

Question. Do you believe any changes are needed to the Fairness Doctrine and the Equal Time Rule?

Answer. Already answered.

Question. When you enter a campaign, how much of the entire amount you spend is devoted to airing broadcast spots?

Answer. The amount of money we spend airing broadcast spots varies with each campaign. In certain states (such as Missouri in 1980) virtually all our money is spent on broadcast time. In other efforts, there is a broad mixture with broadcast spots being about 20% of the total.

Question. Do you ever have difficulty in buying broadcast air time?

Answer. We frequently have difficulty buying broadcast time due to the broadcasters' dislike of what we are trying to do, or their genuine fear of libel, slander, or violation of various FCC rules, such as the Fairness Doctrine. However, after negotiations, in most cases we are able to get as much time in a media market as we need. We are willing to indemnify broadcasters from any responsibility for our commercials, and this usually works. I might point out parenthetically that many broadcasters hide behind the Fairness Doctrine rather than give us the real reason they won't take our commercials. I believe it is the right of the broadcaster to refuse our commercials, if they choose to; but they should tell us why.

Question. What rate do you generally pay for broadcast air time? Have you ever believed broadcasters were forcing you to pay unduly high rates?

Answer. Our rates generally vary from station to station. Sometimes we are given the candidate's rate which is relatively cheap, but most of the time we are charged the non-political rate which is relatively expensive. In a small number of cases, broadcasters have forced us to pay unduly high rates.

Question. What is the duration of most of your broadcast spots? Why do you buy this duration?

Answer. The duration of most of our spots prior to 1984 was thirty seconds. After 1984, we began extending the commercials to sixty seconds. We have also produced one-half of our films in our independent campaigns and will probably be doing that in the future. The reason we have used thirty second commercials most of the time is the price. We view the process of buying time as message units, and we have generally found the greater number of message units is better than fewer message units with more time in each one.

Question. Do you consider negative advertisements more effective than supportive messages in influencing voters? Why so? Have you tested voter reaction to back up this conclusion?

Answer. Negative advertisements and supportive advertisements both are important in almost any political campaign. Sometimes negative ads are much more effective than supportive ads due to the peculiar circumstances in each state. For example, if our polling data found that an incumbent liberal had a 65% favorable name identification and a 10% unfavorable name identification, and at the same time people were unfamiliar with his record, this would be an ideal place for negative ads. At the same time, if his opponent had a very low name identification, obviously supportive messages about him would be critically important as well.

We have tested voter reaction to virtually every advertising campaign we have run. We have only run the commercials based on what survey data said was successful and what was not successful. In certain cases the polling data shows that the advertising was wildly successful, while in other places it was only moderately so. We measure our success by whether the polls show an increase in a target's unfavorable rating and/or a decrease in his favorable rating. We also measure the head-to-head race and whether there has been an improvement in the position of the candidate we are trying to support.

Question. When you run a broadcast spot, how do you identify your group? How much time do you devote to this identification?

Answer. Again, the type of identification we use varies from place to place. In Maryland, for example, we began each of our commercials by saying, "This commercial is paid for by the National Conservative Political Action Committee as a service to the people of Maryland." In most cases, however, we merely stand by the legal identification required by the law.

The CHAIRMAN. Next we have Mr. John Houston, executive director, RUFF PAC. Mr. Houston, please proceed.

STATEMENT OF JOHN CHARLES HOUSTON, EXECUTIVE DIRECTOR, RUFF PAC

Mr. HOUSTON. Thank you very much, Senator Danforth. My name is John Charles Houston. I am executive director of RUFF PAC. As an attorney, I have published several articles in the area of constitutional law.

RUFF PAC was created in 1979 and is concerned with electing new Members to Congress who will represent their constituents more effectively on matters dealing with free markets, stable currencies, and sound domestic and foreign policies.

Our political action committee is concerned with S. 1310 for a variety of reasons. We appreciate this opportunity to be heard on the subject and would invite your attention to the brief that we submitted to the committee prior to this hearing. RUFF PAC believes that the intentions of the sponsors of S. 1310 are honorable and constructive. But beyond the mere intentions of the bill, we have serious reservations about the constitutional and public policy problems it raises.

The arena of public debate has been greatly enhanced by the use of television and radio. This means greater intimacy for the voters with the candidates and issues than would otherwise be possible. The advent of the political action committee, which mobilizes millions of Americans as small contributors and participants, has been a subsequent development.

The two are powerful forces upon the political system. Yet in many ways they are a reflection of our society. Both the coverage of the electronic media and the broadness of interests which the some 4,000 political action committees represent have substantially democratized elections.

In a free society, there is by design a clash of interests. The intensity increases in elections because they tend to be focal points of decisionmaking. In any complex issue, there are frequently more than two points of view, just as there may be more than two candidates for a single office.

While it seems reasonable to think in simplified terms about two setpiece candidates squaring off with each other, there is nothing either legally or constitutionally that requires this to be so. This bill seems premised on the unrealistic notion that only two points of view subsume all relevant voices in an election. There is in fact a much broader spectrum of legitimate debate that can and should be heard.

On one occasion in the recent past, Congress attempted to rewrite election laws in a way that diminished some of these conflicts. Subsequently, in the *Buckley* v. *Valeo* decision, the Supreme Court clarified some of the relevant values that the Constitution attaches to the nature and context of political and electoral debate in this country.

In fact, there have been a succession of cases to flesh out the body of law which the Constitution attaches to protecting the forum of public debate. The Supreme Court wrote in 1964 that:

> Speech concerning public affairs is more than self-expression; it is the essence of self-government. *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).

As the Supreme Court has stated in *Roth* v. *United States*, 354 U.S. 476, 484 (1957):

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The first amendment affords the broadest protection to such political expression in order to assure the unfettered exchange of ideas for the bringing about of political and social changes desired by the people.

As the Court made clear in the *Buckley* case, these constitutional guarantees have their "fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley* v. *Valeo*, 424 U.S. 1,15 (1976) Quoting *Monitor Patriot Co. V. Roy*, 401 U.S. 165, 272 (1971).

In *Buckley*, the Supreme Court held that the guarantees of the first amendment include the right of individuals and groups to make unlimited independent expenditures to advocate the election or defeat of a candidate for public office.

The Court found that the statutory barrier to the exercise of that right represented by the spending limits in the Federal Election Campaign Act of 1971 "heavily burdens core first amendment expression" and is not justifiable on the basis of any substantial governmental interest. In short, the Supreme Court in *Buckley* found that the first amendment protects independent expenditures to advocate or oppose a candidate's election, whether made by individuals or by persons acting collectively or by political committees.

The Supreme Court has also made it clear that independent PAC's are entitled to full participation in the political debate and possess traditional first amendment rights:

> We also reject the notion that the PAC's form of organization or method of solicitation diminishes their entitlement to first amendment protection. The First Amendment freedom of association is squarely implicated in this case. The PAC's are mechanisms by which large numbers of individuals of modest means can join together to "amplify the voice of the adherents."

FEC v. *National Conservative Political Action Committee*, 842 ED. 2d 453, 458 (1985).

As the Court has stated in the *Bellotti* case, "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." 435 U.S. 765, 777 (1978).

In the *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1968), the Supreme Court approved the fairness doctrine and thus the right of the Government to require, in the public interest, coverage by broadcasters of controversial issues. In that case, upon which much of the existing structure of regulation of political broadcasts is based, the Court said:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. It is the right of the public to receive suitable access to social, political, ethical, moral, and other ideas and experience which is crucial here.

Thus, S. 1310, with its provisions affecting the content of political broadcasts and discouraging stations from accepting advertising by independent political action committees and individuals, is not an extension of the current broadcast regulatory framework, but rather is an attempt to regulate and restrict political speech inconsistent with existing broadcasting law.

The bill's sponsors openly declare that they are responding to expenditures by independent political action committees, that they are concerned with the nature of advertisements aired by the candidates and independent groups and individuals, and that they intend to change the political debate in the United States by making it more decent and balanced.

Here, with stations legally able to refuse to sell advertising to independent individuals and political committees, the chilling effect would be severe.

RUFF PAC has indentified three items of concern regarding the constitutionality and public policy implications of S. 1310.

The first constitutional criticism I would have is that the record fails to establish that there is a sufficient harm present to justify a legitimate governmental interest in regulating political debate. The question presented is whether there is a sufficient legitimate government interest in preventing the harm identified.

Evidently, the bill's sponsors feel that the effect of negative political advertising and campaigning by independent PAC's and individuals on the Congress is substantially altering the Nation's political debate. If this is so, there is a serious question whether the restriction is sufficiently narrowly tailored.

RUFF PAC believes that S. 1310 fails both aspects of this constitutional test. First, the primary reasons thus far advanced by the bill's sponsors to urge its adoption are illegitimate government interests and therefore serve to signal the unconstitutionality of the bill rather than provide it any theoretical support.

Mr. Chairman, for instance you have stated that you hope the bill will bring more balance to political ads. However, the Supreme Court in *Buckley* declared that "balance" is an unconstitutional goal for governmental action in the political arena:

> The concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the first amendment.

Similarly, you have stated that the bill would legislate decency for political ads. However, the Supreme Court has stated that debate on public issues should be uninhibited, robust, and wide open. *New York Times* v. *Sullivan* case, 376 U.S. 254, 270 (1964).

In the *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 792 (1978), the Court also stated that:

> The fact that advocacy may persuade the electorate is hardly a reason to suppress it. The Constitution protects expression which is eloquent no less than that which is unconvincing.

The second constitutional point is that S. 1310 fails the test of using the least intrusive regulation of first amendment rights. The second prong of the Court's test—whether the legislation is sufficiently narrow to accomplish its legitimate purposes—cannot be met. The bill in its present form is so loosely drafted as to appear to directly censor the speech of all candidates for Federal office and all noncandidates who seek to broadcast political views.

In *Thomas* v. *Collins*, 323 U.S. 516 (1944), the Supreme Court held unconstitutionally vague the application of a statute requiring labor organizers to identify themselves and carry an organizer's card before soliciting persons to become members of a union. The Court found that:

> No speaker safely could assume that anything he might say upon the general subject would not be understood by some as an invitation [to join a union].

The third criticism we have is that S. 1310 violates the public policy of ensuring that all points of view can be heard on public matters. Any statute which creates a predicate before words of political debate can be uttered, as in the *Thomas* case that I just mentioned or in the enforcement of S. 1310, is foreign to free and robust debate. The attempt to weight political conduct of debate in a way that seems fair to the sponsors of the bill appears beyond the power of the Congress.

What drives this bill is the notion that you can segment political speech into classes. Under S. 1310, the most privileged class would be designated candidates. In person, any candidate on television could say anything true or not. But a private citizen or a PAC who has no access to either candidate would realistically be shut out of the debate for purposes of its most important medium.

Since most third parties are unlikely to spend money to tell the public that Joe Candidate is a good guy, S. 1310's approach of conferring equal time attempts to gut the voice of dissent by ensuring a free ride to a candidate to respond to criticism of any act, no matter how dastardly. The voice of dissent and even the mere potential of public exposure is a great influence to curb objectionable, improper, and illegal conduct of public officials. Attempting to neutralize this dissent as S. 1310 does is a mocking charade of the first amendment.

To tell the public that the acts of elected representatives who stand for office or their challenger's are to be immune or at least padded with free air time is to degrade political debate. Any advertiser or consumer is free to criticize a product. How much higher value ought we place on the right of the public, whether acting as an individual or PAC, to speak its mind at election time?

The public is used to hearing the good and the bad about candidates, cars, COLA's, et cetera. We patronize them when we imagine that they are unfit to distinguish between conflicting voices at election time. Free choices and free elections cannot be conducted otherwise.

The public has a strong feeling of fairness and basic good sense. There must be some truth to a political charge, or the public will quickly dismiss it as mere fluff.

That a candidate may need to respond to a charge is the very essence of healthy political debate. One must ask what is the power of Congress to fine tune political debate with the techniques of this bill, which will do much to chill debate and little to inform the public about their choices for public office. This attempt to quash independent voices is an unsubtle message that elections are the private business of politicians.

In summary, S. 1310 fails the threshold test of identifying a sufficient governmental interest in the alleged harm of the present state of political debate in this country. It fails the test of discrete solution by employing the least objectionable or intrusive means to accomplish its purpose. And it violates important public policy about the conduct of elections.

Moreover, S. 1310 would chill or directly censor protected political speech and is intended to do so. No constitutional purpose has been advanced to justify this effect, and the bill is sufficiently vague that it is impossible to define with any degree of precision which candidates and what speech it affects. Finally, the bill is drawn broadly, without regard to possible lesser alternatives.

For all of the above reasons, we believe S. 1310 as presently drafted cannot withstand judicial scrutiny and would be declared unconstitutional. Therefore, we would urge you to dispense with further actions on this well-intentioned but flawed approach.

Thank you.

The CHAIRMAN. Thank you, Mr. Houston.

Of course, the law firm of Sidley & Austin has an opposite view on the constitutionality of this bill.

Tell me about RUFF PAC. Do you run television commercials?

Mr. HOUSTON. Yes, and radio.

The CHAIRMAN. Are they negative commercials?

Mr. HOUSTON. I think in the context of an independent expenditure, as I indicated, they are inherently going to be critical and negative, yes.

The CHAIRMAN. Are they run against congressional candidates?

Mr. HOUSTON. Yes.

The CHAIRMAN. All against congressional candidates?

Mr. HOUSTON. To my knowlede, yes. For example, in the last election cycle we spent something like $100,000 in a congressional race on behalf of Bob Dornan, who was the challenger at that point, and I think it was a combination of media.

The CHAIRMAN. But it was mainly negative, against Congressman Dornan's opponent?

Mr. HOUSTON. Yes. It was primarily highlighting the issues, and I believe it was Congressman Patterson at the time, his record, his performance in Congress.

The CHAIRMAN. Do you think that we in Congress should just forget about the election process, or do you think that we have a bona fide interest in a healthy political climate?

Mr. HOUSTON. Well, there is a short answer and a long answer. Can I give you the long answer?

The CHAIRMAN. How long is long?

Mr. HOUSTON. I will try to be brief.

The CHAIRMAN. Give me a brief long answer.

Mr. HOUSTON. I think that the efforts in the last 10, 15 years to reform election law created some peculiar circumstances relative to the rest of American history in the way that we fund elections and the way that we construct candidates, and what you ended up with were a whole bunch of anomalies that we had not had before.

Add to that the impact of television, which is greater today. Add to that the greater money that is available and the greater concentration of power in Washington. All of those have intensified the political process tremendously.

And what I think you are getting at in this bill and I think the feelings that you have are mostly like the tip of the iceberg. I think what you are seeing is independent expenditures as a symbol for what is much more pervasive than that, and that is the tremendous concentration of power that has been brought into being in terms of PAC's. Most PAC's do not make independent expenditures, however. The vast majority do not.

The concerns are legitimate and they are real. The question is in my mind: Ought the Congress to legislate on them? Ought they to be able to do it in a constitutional way? That is where, as you know, we get into a discussion.

The CHAIRMAN. I have consistently said there is nothing etched in stone in this bill. But it seems to me that the problem is obvious, the problem of the 30-second negative commercial and the political action committees running their independent negative campaigns. To me it is an obvious problem.

I am sure there is some disagreement from Mr. Dolan and others, but that is something we can debate. Do you have any suggestions to make?

Mr. HOUSTON. Well, I think recent experience tells you a lot, and that is that if you look at the 1980 election, it is a lot different than any elections that have come along since then; 1980 was the first year that there was significant TV expenditures for independent campaigns. And frankly, most of the campaigns—which were recipients of those ads were not well prepared for them and did not react to them very well.

There were a lot of other things going on that made it look as though those independent expenditures were the cause of those people's defeat. Frankly, I do not think that was the reason. I think there were much more fundamental reasons why a whole bunch of people were defeated.

In that context, if you look at them since, campaigns are much better prepared. If you look at what happened in Maryland against Paul Sarbanes, the ads that were run against him did him no harm at all, if anything they got him going earlier, got his campaign up and running and better organized.

I think there is a fear that may be a little bit exaggerated, sort of like the yellow menace of past years or kudzu or other things. And I do not mean to say there are not real feelings, but just that if you look at the practical impact of independent expenditures, what you are asking yourself is one or two questions: Is the PAC saying things that ought not to be said? Are they bogus charges? Are they smears, character assassinations?

And if they are, that is a little bit different problem. If you are saying they are overweighing the debate by saying what is true and that is perceived negatively, that is not a fit subject for legislation.

The CHAIRMAN. I am not prepared to judge whether they are true or false. All I am saying is that there should be some balance, there should be some right to respond. I mean, I do not view that as chilling debate. I do not understand how it chills debate to say that, well, if you want to weigh in, in a debate, the other side has a chance to respond. That does not sound chilling to me.

Mr. HOUSTON. I think you are assuming a relatively fixed amount of players here, that is that no one else could get in, that there was only a single independent expenditure. That does not reflect the recent experience; take the Simms race in Idaho. There were independent expenditures made on both sides of that race.

I am talking about the 1980 campaign against Senator Church. It was not a simple event where there are two guys and then a third guy comes and gangs up on the first one.

The CHAIRMAN. You mean just a free-for-all?

Mr. HOUSTON. That is very clearly what happened in 1980 in Idaho.

I do not think it is quite as clear cut, and I guess my point is if independent expenditures are going to expose the record of the incumbent, and that happens to be perceived by the voters in a negative way, that is what elections are for.

The CHAIRMAN. If that is what they do. I mean, if a 30-second commercial is capable of exposing accurately the record of an opponent, you may have a point. I do not know that that is so.

Let us say it is. Let us say that a 30-second commercial can be a real contribution to the public debate. I doubt it, but let us suppose that it can be. Then I do not see anything wrong in saying, well, but the other guy gets to have his 30-second commercial.

Mr. HOUSTON. Well, I think where our feelings come from is that what you have done—let us take a worst case scenario and work back from that. Let us say Senator X was part of Abscam, all right, and Candidate Y did not want to mention that. An independent organization felt it was critical. Somehow or another, the word had not gotten out.

The spot came on and said in 30 seconds: Here is a shot of Senator X taking money for a bribe. Under your bill you would give him equal time to respond to that, no matter how unseemly or illegal the acts were. And I think that is where the approach kind of, forgive me, I would say, falls apart.

I think what you would be doing is promoting a sense in the public's mind, in the voters' mind, that somehow or another the system was rigged to neutralize fair comment and fair criticism.

The CHAIRMAN. I do not see it neutralizing fair comment any more than it does when a TV station runs an editorial and the other guy gets a chance to respond. I think we are talking about more talk, more debate, not less, more balance, not less, the ability to weigh in, the ability to offset, the no fair two against one factor, especially when it appears in the last few weeks of the campaign and especially when the candidate against whom it appears is limited to raising money in a maximum of $1,000 increments.

I mean, I just do not see how there is a chance to have a balanced debate under those circumstances.

Mr. HOUSTON. I will grant you, there is a frenetic quality about the last couple of weeks of an election, and there is always some danger that somebody is going to surface an issue that is either highly inflammatory, bogus, whatever.

Frankly, I am not sure television is the best place to surface it through. My experience in watching a lot of campaigns is that radio and newspaper are much more effective in using hard-hitting critical ads as Marshal McLuban said. Television is a very hot medium, and if you come over sounding like you are being extreme, you are being unfair, it is debilitating to the message.

The Chairman. But you see, I do not know anything about RUFF PAC, but I sure know about NCPAC. As Dolan himself said, the candidate, the beneficiary, does not have to sully himself at all. He can just be off there talking about the birds and the bees, and in comes the interloper.

Or the sort of thing that happened to Senator Percy: $1.6 million in the final weeks of the campaign, strictly negative. And what could Senator Percy do about it? Nothing.

Mr. Houston. One thing that might be instructive and I would be interested to know would be to take some polling directly before and after those events, because my personal judgment, my gut reaction, is that those ads are self-defeating when they are irrational or emotional and there is not a firm factual basis to them. If there is a firm factual basis to them, then they speak for themselves.

Now, Senator Percy's case is a good example of the power of independent action interest in it is. But I am still at a loss what Congress' interest in it is.

The Chairman. I wonder, though, about calling a person a chameleon. I suppose you could say there is a factual basis any time you call anybody a chameleon, unless you have somebody who just never changes on anything. But it does not seem to me to be fair debate.

But the point is, what can you do about it? Just say, oh, I am sorry, I will lose?

Mr. Houston. Under your bill, if you called someone a chameleon I would have a hard time distinguishing whether or not that was legally a negative or not, which is one of the problems with the bill.

The Chairman. My bill says two things: One, if you refer to the other candidate, you do it with your own face and your own voice. To me that is not chilling. To me that just says, show us your face. You know, if you want to throw mud, have at it; just show us your dirty hands. To me that is the same concept as "The preceding commercial was paid for by the Citizens for Jones Committee." It is simply disclosure and it is simply saying, show us your face if you are going to throw it.

And the other provision simply says, if NCPAC wants to come in, RUFF PAC, Mr. Goland, anybody, come on in; just come on in and you can do anything you want. You can run any smut you can buy. But just give the other guy a fair chance to say: Hey, you know, here is my side.

It seems to me to be basic fairness.

Mr. Houston. Well, the question—I would have two questions. If you call someone a chameleon, how do you know that everybody perceives that negatively? It is not per se an insult. It is not like fighting words.

The Chairman. It is per se an insult.

Mr. Houston. What I am getting at is this: That is a value judgment, and ultimately what that is going to come down to is going into a court to convince a judge to use his mind whether or not you have crossed the legal line.

The Chairman. All right, tell me this. It is 1 month before the campaign—3 weeks before the campaign. Somebody runs a commercial against Senator Percy showing a picture of a chameleon.

Would you expect him to go into court? I mean, when will he get out of court?

Mr. HOUSTON. You are going to have a very quick hearing, obviously.

The CHAIRMAN. No, you are not.

Mr. HOUSTON. In terms of whether or not you are going to be on the air under your bill, not whether you are going to litigate it for libel.

The CHAIRMAN. My bill does not have any litigation. You mentioned the other guy and it is your face and your voice.

Mr. HOUSTON. Some broadcasters can resist that and say, make me, and you are going to be in court enforcing it.

My point is, you are asking that a legal judgment be made on a very subjective subject, and the problem is that you can change the meaning or the context.

The CHAIRMAN. No, no. There is no subjectivity at all. If you mention the opponent, do it with your own voice and your own face.

Mr. HOUSTON. In the case of independent expenditures, whether or not it is a negative?

The CHAIRMAN. In the case of independent expenditures, if the interloper comes in, the other guy gets equal time regardless of what he says. He can say anything.

Mr. HOUSTON. Well, as I read your bill, it said if it uses negatives.

The CHAIRMAN. No, it does not. Whether it weighs for or against the candidate, the other person gets equal time.

Mr. HOUSTON. All right. Let me rephrase my comment, but with the same point. There are going to be legal lines to be crossed and to be interpreted, and if you are making it a blanket one, that is certainly more clear than "negative." I had real problems when I ran into the word "negative" because it is so subjective.

The second comment is about the first section, dealing with what a candidate may or may not say. There are many instances where candidates are totally inadequate on television, as a matter of fact they should not be on television.

The CHAIRMAN. Well, should not the public know that? I mean, why should you surprise somebody the day that the person takes office and you unveil this jerk?

Mr. HOUSTON. I agree it is a severe problem, but I do not know that it is best dealt with in this context. And my point being, you are putting a heavy strain on certain kinds of candidates and accelerating the power and the influence of telegenic, photographic candidates.

The CHAIRMAN. I do not know about that.

Mr. HOUSTON. To make an argument, clearly some people are going to be much better at doing that. Now, if you are saying the person's picture ought to be on the screen whether or not they say anything, that is a slightly different story, but not much.

And I think what you are doing is censoring the whole concept of fair comment. For example——

The CHAIRMAN. No, I am not, believe me. I am going to have to go on to the next witness, but believe me, I am not censoring anybody. I do not see that it is censoring anybody to say that there is a right to respond. That is the only sanction in this bill against anything, the right to respond.

Mr. Houston. The format in which you put a candidate's comments—in other words, to do this you must be there in person and say it——

The Chairman. Or you get a right to respond.

Mr. Houston. Let us say you get a newspaper story that quoted certain, you know, negative comments, and it certainly was not appropriate to put that person's face in there. You essentially are creating a format which does censor the form and the style in which the information is created.

The Chairman. Well, I very much appreciate your testimony. I thought it was very good testimony. I did not agree with it, but I thought it provided a good treatment of the legal questions.

You might be interested in the Sidley & Austin opinion.

Mr. Houston. I have read it. I am very interested in it. And we greatly appreciated the opportunity to be here.

The Chairman. Thank you, Mr. Houston.

[The following information was subsequently received for the record:]

Questions of Senator Hollings and the Answers

Question. Do you support the Fairness Doctrine and the Equal Time Rule?

Answer. Yes.

Question. Do you believe they are constitutional?

Answer. Yes.

Question. Do you believe any changes are needed to the Fairness Doctrine and the Equal Time Rule?

Answer. No.

Question. When you enter a campaign, how much of the entire amount you expend is devoted to airing broadcast spots?

Answer. That depends upon each particular race. Our average electronic media expenditure for 1984 was 2.43 percent of total expenses (to date we have only used radio ads).

Question. Do you have difficulty in buying broadcast time?

Answer. Yes, there is discrimination against issue advertising.

Question. What rate do you generally pay for broadcast air time?

Answer. The normal spot market, same as rates for business.

Question. Have you ever believed broadcasters were forcing you to pay unduly high rates?

Answer. No.

Question. What is the duration of most of your broadcast spots?

Answer. 60 second radio spots.

Question. Why do you buy this duration?

Answer. It is the most commonly used (80% of the market uses 60 seconds because it offers the best amount of time to get ones point across compared to the cost).

Question. Do you consider negative advertisements more effective than supportive messages in influencing voters?

Answer. Yes, because it creates interest and a basis for deciding between candidates.

Question. Have you tested voter reaction to back up this conclusion?

Answer. No.

Question. When you run a broadcast spot, how do you identify your group?

Answer. RuffPAC, generally spoken at the conclusion.

Question. How much time do you devote to this identification?

Answer. A nominal amount.

The Chairman. Next we will have Mr. Robert Heckman, chairman, Fund for a Conservative Majority.

STATEMENT OF ROBERT C. HECKMAN, CHAIRMAN, FUND FOR A CONSERVATIVE MAJORITY

Mr. HECKMAN. Good morning, Senator. I appreciate the opportunity to be here.

You and I have had a brief opportunity to discuss this matter informally last week and, on behalf of the committee that I represent, the Fund for a Conservative Majority, I appreciate the opportunity to participate in these hearings.

What I would like to do is read part of my written testimony which has been submitted for the record.

The CHAIRMAN. The whole statement will be in the record.

Mr. HECKMAN. Thank you.

We are concerned with three aspects of the bill, basically: the constitutionality of it; the practical application of the bill; and third, what we would see as the unwieldiness and the impracticality of several of the provisions within the bill itself.

In the abstract, perhaps the idea of putting an end to what you call negative campaigning has an appeal to many of us. But like most ideas, that idea itself has real world consequences. The consequences of this legislation we feel are potentially disastrous, producing results that none of us would desire, for we feel that a careful reading of the bill and an analysis of its practical implications would reveal that the result would in fact be the termination of all independent political activity in Federal elections.

This act would require broadcast licensees to provide free response time—and I would stress, free—to Federal candidates if any person other than the candidate broadcast material either endorsing or opposing a candidate for Federal office. The practical result of such a restriction is clear, that only the candidates themselves would be permitted to broadcast views and opinions on Federal races.

Why do I say that? Because in practice broadcast licensees would never be willing to incur the additional cost of free response time required if anyone else other than the candidate airs an advertisement. Therefore, we feel that broadcast licensees will either refuse to accept such advertisements or require an additional payment, an additional fee to cover the cost of any potential free response time that would be triggered.

The net effect of S. 1310 by its terms and in practice would be to terminate the exercise of any independent political activity because of the unwillingness of those broadcasters to accept advertisements expressing the views and opinions of those independent from Federal candidates.

If enacted, this act would also constitute a massive erosion of the right of free speech as guaranteed by the 1st and 14th amendments to the Constitution. It would place restrictions on independent political activity in Federal elections and effectively extinguish the ability to express independent political views, thoughts, or opinions on candidates for public office.

Yet, that right of free speech is a fundamental right on which our society and the entire electoral process are based. The impact of S. 1310 would be to restrict that very right protected by the Constitution and reaffirmed in *Buckley* v. *Valeo* as deserving the broadest first amendment protection.

We also see a number of practical problems inherent in the bill as it is currently drafted and I would like to deal with a few of them. Implementation of the first provision of this act, for instance, is triggered by a "utilization of broadcasting station." Yet, that very term is not defined in the new bill.

The bill also requires the candidate to make the reference in person to prevent the broadcast licensee from being required to grant free response time. Again, however, the term "in person" is not defined. In this term, for instance, does it require visual appearance or, as indicated in past interpretations, is a voice sufficient?

Additionally, the Senate bill requires free response time if the Federal candidate refers to another candidate for that office, but what do we mean by "refer"? Does "refer" include the mere mention of his opponent's name? Does it include a comment which clearly identifies the person in question? Must the reference be derogatory in nature or is any reference sufficient?

Also, who makes the decision on whether a reference is made, the broadcast licensee? If so, can he now preview all political advertisements, including those tendered to him by the candidate and the candidate's committee, to determine in advance whether free response time would be required? And if so, could he now censor out the offending passages as a condition to access?

This would result in a burden being placed on broadcast licensees, not only to screen all broadcast advertisements for Federal candidates, but also to judge and censor such advertisements to ensure that they will not be liable for free response time to other Federal candidates. We feel that the Federal Communications Commission would undoubtedly be inundated with requests for rulings by broadcast licensees on these questions.

If the free response time provision is triggered, the broadcast licensee must provide to the candidate to which reference was made the opportunity to respond without charge. How must a licensee convey that opportunity? Does the candidate referred to have to come forward? Does the licensee have to contact the candidate?

Also, is the Federal candidate limited to responding to the message made or can he use the broadcast time in any manner that he wishes to?

A number of the same problems inherent in the first provision of the act appear in the second provision as well. For example, the term "broadcast material" is included in the second provision without definition, without consideration of potential exemptions from the generally accepted definition. Does such broadcast material include editorial endorsements, news clips, and the like?

The most far-reaching effect of the provision is its application to any broadcast in which a Federal candidate is either endorsed or opposed. Once again, neither term is defined in the act. For example, suppose an organization broadcasted an advertisement which merely presented the voting record of a Federal candidate, or offered an advertisement presenting a full and fair exposition of the facts concerning a Federal candidate or issue, or presented an advertisement of visuals, without any editorial comments.

Furthermore, suppose I as a representative of our group, the Fund for a Conservative Majority, and our 167,000 members would appear as a guest on the Today show and were to express my organization's support or endorsement for you. Would that trigger free response time on the Today show by all of your opponents?

How would these be considered under the second provision of this act? Who would make the decision as to whether an advertisement endorses or opposes a Federal candidate?

On September 22, Paul Taylor of the Washington Post examined this assault on what you have called negative advertisements in an article entitled "Dump on Your Opponent: Negative Campaigns are as American as Don Rickles." Stated Taylor:

> Attack ads are, for better or worse, the very dialogue of modern political campaigns. They are the place where the issues are joined, where images are shaped and reshaped, where appeals are boiled down to their essence.

Indeed, the public record of an incumbent Federal candidate and his responsiveness or lack thereof to his constituents is one of the few sources of unbiased material available to the general public with which to judge candidates for Federal office. Advertisements which utilize such information as appears in the Congressional Record or other public documents are merely making such information more readily available by means of broadcasting, whether those ads be positive or negative.

More importantly, the consequences of this act, the Clean Campaign Act, would be to serve as a means for further protecting the reelection capabilities of incumbents. Already, some 95 percent of the Members of the House of Representatives, just as an example, are reelected every 2 years. This act would as its consequence actually strengthen the hands of incumbents by restricting the ability of challengers to critically attack the record of an incumbent.

Finally, on an issue that is close to us, the Clean Campaign Act of 1985 would serve to curtail and perhaps eliminate the participation of independent committees in the political process. Perhaps there is no potential consequence of the act more obnoxious than this one. By what divine right would Congress deem that it is only appropriate for candidates and their opponents to speak out on matters so critical to the American people as the election of those very Members of Congress?

Founding Father James Madison surely foresaw the potential for such problems when, in "The Federalist Papers," he noted that the "occasional regulation" of the election process by Congress would be "improper." As mentioned, Members of Congress have enormous advantages in running for reelection. We should not allow one of those advantages to be the ability of Congress to restrict who can and who cannot comment on the records and abilities of each individual Member.

This last issue, the ability of independent forces, be they individuals or committees, through contributions or through independent expenditures, to participate in the electoral process, is a particularly important one for us since we are such an independent vehicle and we have spoken out during campaigns on a consistent basis.

For close to 5 years, we fought an attempt by the Federal Election Commission to curtail our ability and the ability of our donors to express their feelings on Presidential campaigns through the vehicle of independent expenditures.

The restrictive efforts of the Federal Election Commission were finally and decisively rejected by the Supreme Court in a 7-to-2 ruling handed down this past March. In part, the Court in its March decision pointed out that allowing independent presentation of views, but shrouding them, if you will, in impossible restrictions, "Is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."

It is our contention that the same principle applies here. The restrictions, in practicality, and the confusion produced by this act will undoubtedly have the effect of rendering independent committees and individuals working outside of official campaign committees unable to participate in the political process. The net result would be a less informed, less educated, less involved voter.

There is no right more critical to the continuation of a free, open, and democratic system than the right of the voters to freely select their representatives to Congress. Restrictions and regulations of the kind proposed here would make it all the more difficult for the voters to exercise that right.

Instead of prohibiting political action and hampering the ability of voters to decide for themselves what candidates are worthy of election or reelection, we suggest what might be called a novel approach, an approach that worked well in this country for two full centuries. Let us let the voters themselves regulate the system by accepting or rejecting so-called negative advertising at will, by accepting or rejecting the participation of outside forces at will, accepting negative advertising, as they apparently did in a Kentucky Senate race this past election cycle, or rejecting it, as they apparently did in Maryland.

Let us let the voters decide. After all, we feel that is what democracy is all about. Therefore, we urge defeat of this bill.

The CHAIRMAN. Do you think that what democracy is all about is 30-second commercials attacking some candidate or another, which are paid for by an independent committee which nobody ever heard of before?

Mr. HECKMAN. Senator, we were involved in the 1984 Senate elections in running an independent expenditure in North Carolina. We ran such 30-second commercials. We ran them under the name of a committee called Friends of Jesse Helms, and the committee was not a committee that no one had ever heard of, since its chairman was Congressman Jim Broyhill of North Carolina.

The commercials consisted of an endorsement by Congressman Broyhill of Senator Helms, and they simply talked about issues that Senator Helms had been involved in and why Jim Broyhill felt that Jesse Helms should be reelected.

My point in bringing that up is to say that that kind of commercial, a positive endorsement by a prominent political figure who is well-known and respected throughout the State, would be prohibited or at least restricted in your bill.

The CHAIRMAN. Nothing would be prohibited.

Mr. HECKMAN. Well, it would be restricted because in practicality broadcast licensees will not accept those kinds of commercials. They would not be forced to and they would not accept them because of the requirement that they give free response time to the opponent.

The **Chairman**. You do not suggest that anybody would be forced to accept commercials?

Mr. **Heckman**. No, but I do suggest that Congress should not make laws which in essence provide a disincentive to broadcast licensees to accept the opinions of outside groups.

The **Chairman**. Well, I do not know if fairness and balance is a disincentive. What is wrong with that? It seems to me to be simply a matter of basic fairness and basic balance in a campaign; when you have somebody like your group or Mr. Dolan's group or anybody else's group or an individual, such as happened in Illinois, that weighs in heavily. Your commercials, when did they run in the campaign?

Mr. **Heckman**. They ran throughout the campaign, starting in June and running through mid-October, I would say.

The **Chairman**. But that was an unusual campaign, was it not? I mean, everything was out immediately. More than a year in advance, people started swinging away.

But most of these campaigns, it is within the last month, is it not?

Mr. **Heckman**. I am not sure which campaigns you are referring to, but I think the experience of some of the independent expenditures in 1982 and 1984 is rather enlightening. As I mentioned at the end of my testimony, you look at what happened in Maryland. There was a considerable amount of negative campaign advertising by outside groups done against Senator Sarbanes in Maryland. The general consensus is that, far from hurting Senator Sarbanes, it helped Senator Sarbanes get reelected.

My point would be that the voters made the decision there, and I think that the most fair system of all is the system in which the voters are allowed to make a choice as to who to elect and who not to elect.

The **Chairman**. Do you think that your group is effective?

Mr. **Heckman**. I think we are effective. I think——

The **Chairman**. Do you run negative commercials?

Mr. **Heckman**. We had in the past, but over the last 4 years we have not run any negative TV: no.

The **Chairman**. Do you think negative television is effective?

Mr. **Heckman**. I think at times it is, but I think it's a misnomer to call it negative. I think that ads which talk about the record of an incumbent are a very important part of the political dialog and I think they are often effective.

The **Chairman**. Do you think coming in a campaign and running ads by your organization, either for or against the condidate, is effective?

Mr. **Heckman**. I think at times it is effective. We try to show a responsibility toward our donors by not doing it in cases where it would not be effective.

The **Chairman**. You would not be doing it if you thought that it was not effective, would you?

Mr. **Heckman**. That is right.

In the North Carolina example, we did extensive polling in the State. We found out that the people of North Carolina cared what

Congressman Broyhill thought about the Senate race, and we broadcast an endorsement by Congressman Broyhill of Senator Helms. I see no reason why that should be restricted or prohibited.

The Chairman. Let me ask you this. Why should your group be able to do that? Why should your group be able to do that, when any Joe Blow who wants to contribute to a campaign is limited to $1,000?

Mr. Heckman. Well, I agree with your point there, Senator.

The Chairman. Why should he be able to contribute $5,000 to your group and only $1,000 to Senator Helms?

Mr. Heckman. If the thrust of your point is that the limits are ridiculous, I would agree with that. And we have long stated that we feel the limits should be amended and eventually lifted entirely.

The Chairman. We do have a stacked deck now in favor of the political action committees, do we not?

Mr. Heckman. I think we have a stacked deck now in favor of incumbents as well. But if you are saying that the committees——

The Chairman. I am not sure about that. But I mean, we certainly have one stacked in favor of political action committees as a matter of law, do we not?

Mr. Heckman. If you are saying committees can accept more money than candidates, yes. But it is a matter of law that your Congress has passed.

The Chairman. And also because the Supreme Court has decided that independent committees can spend anything they want. So they have a much easier time raising money than a campaign and they can spend anything they want; right?

Mr. Heckman. But so can a campaign spend anything it wants, Senator.

The Chairman. But a campaign has to go out and raise money in a maximum of $1,000 increments.

Mr. Heckman. But that is a statute that was passed by this Congress and it could be amended by this Congress, and I do not see that amendment in this legislation.

The Chairman. Well, that might be a good idea. The Commerce Committee does not happen to have jurisdiction over that question, but that may well be a good idea.

Do you think the system is good? Maybe you do. I guess that is your testimony, that this is just fine, that the dirtier the better, just let the fur fly.

Mr. Heckman. I do not think the system right now, Senator, is dirty at all, and it is our feeling that a system in which the voters and independent groups have a right and an opportunity under the first amendment to freely exchange ideas in what is a very important process, the electoral process, we feel that that system is a very good system.

The Chairman. Well, if that is what you want, then why not let the other guy come in and express himself, too?

Mr. Heckman. I think he should come in and express himself. But, as I have tried to point out, when you talk about free response time, what you are going to do is restrict the ability of the independent committees to get involved because the stations are not going to accept those commercials.

The CHAIRMAN. Maybe; maybe not. It has not restricted the TV stations in running their editorials. I mean, when you consider the amount of the revenue for a TV station produced by negative political commercials run by interlopers, it has to be miniscule.

As a matter of public service, who is to say that they are not going to take the position that, all right, you get free response time? I do not rule that out.

Mr. HECKMAN. I am not sure of the point of your comment.

The CHAIRMAN. The point of my comment is that you say it has some chilling effect to say that both sides should be heard. I do not think that necessarily follows.

Mr. HECKMAN. No, we are saying there is a chilling effect when Congress tries to decide who has more of a right than someone else to speak out in a political campaign.

The CHAIRMAN. We are not saying that at all. We are saying a fair chance to respond. Why does that say that there is more of a right?

Mr. HECKMAN. Well, the way you are doing that, Senator, is you are forcing free response time, and therefore you are restricting the ability of independent committees to get involved in these races.

The CHAIRMAN. Why? You can do anything you darn well please. Just do not pile on. Give the other guy a chance.

Mr. HECKMAN. But we will be forced to pay double the cost that you pay in your own campaign, is basically your point.

The CHAIRMAN. That is not necessarily my point.

Mr. HECKMAN. Do you not feel that is the practical effect?

The CHAIRMAN. You are the witness. But no, I do not. I do not rule that out. It seems to me that political campaigns, other than North Carolina, do not last forever.

Mr. HECKMAN. Thankfully.

The CHAIRMAN. The commercials in political campaigns basically are run only 2 months out of every 2 years. The total amount of television advertising, the total amount of political advertising compared to television advertising during that time, even just during that 2 months, has to be a tiny fraction. And the total amount of negative campaign advertising has to be a miniscule fraction.

I do not think that it is asking too much of people who are licensees of the airwaves to say, all right, we are going to give free time. So they take 30 seconds worth of a song off the air and run it. I do not think that is asking too much.

Mr. HECKMAN. Senator, when we are involved with an independent expenditure in a political campaign, we are forced to provide mountains and mountains of proof to the broadcasting stations as to the validity of the claims made in the various commercials. We have found that the stations look for any and all opportunities to keep us off the air, simply because they do not want the hassle of problems coming from the various campaigns.

The CHAIRMAN. Well, if they do not want you on the air, they can just say no, can they not?

Mr. HECKMAN. Well, that is true. But oftentimes they obviously want to accept the revenue if they are sure of their grounds. But they look to dot every "i" and cross every "t."

The point I am making is that would become far worse if you were telling those broadcast licensees that, if they cross over the line into negative advertising or if they present any kind of a commercial that falls into this bill, they are now going to have to give free response time to someone else.

The **Chairman**. Mr. Heckman, let me tell you, I have nothing against the Fund for a Conservative Majority. I am not trying to do anything that is detrimental to you or anything else. But it does seem that there are higher values in our society than how much air time you can get out of a TV station.

Mr. **Heckman**. Senator, we feel there are much higher values, too, and the highest value we would believe is the first amendment right to select, unrestricted by you, this committee, or the Congress, to select who we wish to see in Congress.

The **Chairman**. Well, I agree with that. But I think that fairness, balance, increasing of information, and allowing a reasonable time to respond is in the service of that.

Well, in any event, thank you very much for being here. You have provided good testimony for us and a lot to think about. And I especially appreciate the more specific comments that you have on the legislation. We will be bearing that in mind.

Mr. **Heckman**. Thank you, Senator.

[The statement follows:]

STATEMENT OF ROBERT C. HECKMAN, FUND FOR A CONSERVATIVE MAJORITY

Good morning, Mr. Chairman, members of the Committee and members of the panel. My name is Robert C. Heckman and I am the Chairman of Fund for a Conservative Majority, a non-profit, non-membership organization established in 1972 as a multi-candidate campaign committee. In addition to providing direct support to candidates seeking election to Federal, state and local offices, Fund for a Conservative Majority educates members of the general public on candidates for nomination or election to various offices and on issues of significant importance to the electoral process. Since its organization in 1972, Fund for a Conservative Majority, as reflected by its expenditures, has become the second largest political action committee in the United States. In the 1984 federal elections the organization made $2,187,628.00 in independent expenditures; over a two year election cycle, we spent close to $5.5 million. As the second largest and one of the oldest independent political committees in the United States, I appreciate this opportunity, on behalf of the Fund for a Conservative Majority and its 167,000 supporters, to express our views on the current legislation pending before this committee, Senate bill 1310, entitled "The Clean Campaign Act of 1985."

My testimony shall address a number of problems that we see inherent in the Clean Campaign Act of 1985. Those problems are all related to the potential effect of this bill; the impracticality and unwieldiness of several of the specific provisions; and the generally unconstitutional nature of the act.

The Clean Campaign Act of 1985 was introduced by Senator John Danforth, its sponsor and Chairman of this Committee, to curtail the use of so-called "negative" campaign advertising in federal elections. Apparently, Senator Danforth believes the legislation is ripe for introduction because, in his words, although "negative campaigning has always existed in American politics, . . . the advent of television commercials and political action committees has blown it into previously undreamed-of proportions." [1]

In the abstract, perhaps the idea of putting an end to "negative" campaigning—a style of campaigning that has been equated with "dirty" advertising—has appeal to most of us. But as author Richard Weaver pointed out some years ago, "ideas have consequences." And the consequences of this legislation are potentially disastrous, producing results that none of us would desire.

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[1] United Press International, June 17, 1985.

Senator Danforth claims the bill does not seek to eliminate or restrict political action committee advertisements; that it merely attempts to restore some balance to federal campaigns. However, a careful reading of the bill and an analysis of its practical limitations in the broadcasting industry reveal that the result would, in fact, be the termination of all independent political activity in federal elections.

The Clean Campaign Act of 1985 would require broadcast licensees to provide free response time to federal candidates if any person broadcasts material either endorsing or opposing a candidate for federal office. The term "person" includes an individual, partnership, committee, association, corporation or any other organization or group which is not a candidate or an authorized committee of a candidate. The practical result of such a restriction is clear: only the candidates themselves or their authorized committees will be permitted to broadcast views and opinions on federal elections. Why? Because in practice, broadcast licensees would never be willing to incur the additional cost of free response time required if anyone else airs an advertisement. Therefore, broadcast licensees will either refuse to accept such advertisements from anyone other than candidates and their authorized committees, or will require an additional fee to cover the cost of any potential free response time which may be triggered as a result of the broadcast.

The net effect of S. 1310, by its terms and in practice, will be to terminate the exercise of any independent political activity because of the unwillingness of broadcasters to accept advertisements expressing the views and opinions of those independent from federal candidates.

The involvement of independent political thought, in whatever form, is essential to our democratic society and our electoral process. James Madison, in the Federalist Papers, talked of the integral function performed by such "factions", and Alexis de Tocqueville further lauded their role in rendering the "dangers of liberty" bearable. Independent political committees and other organizations, not associated with any particular federal candidate, serve to inform and educate the general public on federal elections, candidates and issues. So called "negative campaign advertisements" by independent political groups often focus the voter's attention on the candidates and generate discussion and inquiry concerning the candidates and the issues.

If enacted, the Clean Campaign Act of 1985 would constitute a massive erosion of the right of free speech, as guaranteed by the First and Fourteenth Amendments to our Constitution. It would place restrictions on independent political activity in federal elections and effectively extinguish the ability to express independent political views, thoughts, or opinions on candidates for public office.

The right of free speech is a fundamental right on which our society and the electoral process are based. As stated by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth* v. *United States*, 354, U.S. 476, 484 (1957)):

"Discussion of public issues and debate on the qualification of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by people'."

The impact of S. 1310 is to restrict this very right protected by our Constitution.

It is suggested that the Clean Campaign Act of 1985 tends to increase a candidate's accountability in federal campaign advertising by requiring the candidate to appear "in person" if he or she intends to refer to an opponent for the same office. As stated by Senator Danforth: "the public will see with its own eyes and hear with its own ears that candidate, not some anonymous actor or a pretentious voice narrating a staged scene."[2] However, what is so magical about the appearance of a candidate that heightens accountability? Doesn't the Senate bill, in essence, result in dictating the behavior of candidates during the electoral process? Is the "heightened accountability" factor necessary in an advertisement which, for example, merely presents the voting record of an incumbent federal candidate? Or which shows that incumbent candidate at work? Or which illustrates the results of that incumbent's voting record?

The Clean Campaign Act of 1985 would amend Section 315 of the Federal Communications Act, 47 U.S.C. 315. We see a number of practical problems inherent in the bill as it is currently drafted. Generally, these involve vagueness in the terminology utilized; this vagueness will ultimately affect the implementation of the bill.

The first provision of this act would require that, if a federal candidate or an authorized political committee refers to any other federal candidate in any television or radio broadcast, such reference must be made in person by the candidate. If such reference is not made in person, the broadcast licensee is required to grant the federal candidate referred to an opportunity to respond, free of charge.

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[2] Statement of Senator Danforth, June 17, 1985.

Implementation of this provision is triggered by a "utilization of broadcasting station" for the purposes defined above. Yet that very term, "utilization of broadcasting station" is not defined in the new bill. Perhaps it refers to the term "use" which is currently in the existing communications act. However, such "use" does not include appearances by a legally qualified candidate on any broadcast which is a newscast, news interview, news documentary or coverage of on the spot news. Recent FCC rulings also exempt broadcast debates between political candidates and broadcast press conferences held by candidates. Are these activities also exempt from the term "utilization of broadcasting station" in this new bill?

The bill also requires the candidate to make the reference "in person" to prevent the broadcast licensee from being required to grant free response time. However, the term "in person" is not defined. Does the term require visual appearance or, as indicated in past interpretations of the term, is a voice sufficient if it is clearly identifiable with a particular federal candidate? Also, if the advertisement is a combined ad for a particular group of candidates, does the mere appearance of one constitute "in person" sufficiently to protect the broadcast licensee. Once again we face the problem of whether there are any exemptions from this provision; such as debate, panel discussion, news interview or news conference.

Additionally, the Senate bill requires "free response time" if a federal candidate *refers* to another candidate for that office. Does "refer" include the mere mention of his opponent's name or does it include a comment which clearly identifies the person in question? Must the reference be derogatory in nature to trigger the right to "free response time" or is any reference sufficient? Once again, there are not standards or parameters with which to determine whether "reference" to another candidate results in "free response time." Also, who makes the decision on whether a reference is made, the broadcast licensee? If so, can he now preview all political advertisements, including those tendered to him by candidate committees, to determine in advance whether "free response time" would be required and, if so, can he now censor out the offending passages as a condition to access?

The "in person" reference to another federal candidate can be made "directly or indirectly" and result in triggering the requirement of free response time. We face the same problems of who makes the decision as to whether there in fact was such a "direct or indirect" reference made. Does the broadcast licensee? It would seem appropriate since they are responsible for providing the free response time if the provision is triggered.

However, this results in a burden being placed on broadcast licensees not only to screen all boadcast advertisements for federal candidates but also to judge and "censor" such advertisements to insure they will not be liable for free response time to other federal candidates. Apparently, broadcast licensees will be permitted to censor advertisements, since no language is included in the bill preventing such a right. In any event, the Federal Communications Commission will ultimately be inundated with requests for rulings by broadcast licensees.

If the free response time provision is triggered, the broadcast licensee must provide to the candidate to which reference was made the opportunity to respond without charge. How must the licensee convey the opportunity? Does the candidate referred to have to come forward or does the licensee have to contact the candidate? Also, is the federal candidate limited to responding to the reference made or can he use the broadcast time in any manner?

The second provision of the Clean Campaign Act of 1985 is directed at independent political activity. In summary the bill provides that if any licensee permits an individual, corporation or committee to broadcast material which either endorses or opposes a federal candidate, the licensee shall provide to any federal candidate opposing the endorsed candidate or the candidate so opposed the opportunity to utilize the broadcasting station free of charge.

A number of the same problems inherent in the first provision appear in the second provision in terms of the vagueness of the language and its practical implementation in the broadcasting industry and political arena. Additionally, the term "broadcast material" is included in the second provision without definition and without consideration of potential exemptions from the generally accepted definition. Does such "broadcast material" include editorial endorsements, newsclips, etc.?

The most far-reaching effect of the provision is its application to any broadcast in which a federal candidate is either "endorsed or opposed." Once again, neither term is defined in the Act to give broadcast licensees or independent political activists an idea of what, if any, broadcasts fall outside the parameters of the provision. For example, suppose an organization broadcasted an advertisement which merely presented the voting record of a federal candidate, or offered an advertisement presenting a full and fair exposition of the facts concerning a federal candidate, or presented an advertisement of visuals without any editorial comments which might be interpreted as an endorsement of or in opposition to a federal candidate. Furthermore, suppose I, as a representative of Fund for a Conservative Majority, were to appear as a guest on the "Today" show and were to express my organization's support for Senator Danforth. Would that trigger free response time on the "Today" show by all of Senator Danforth's opponents? How would these be considered under the second provision of the Clean Campaign Act of 1985 and who would make the decision as to whether an advertisement endorses or opposes a federal candidate? The Federal Communications Commission or the individual broadcast licensees?

The purpose of this act, as mentioned earlier, is apparently to curtail the use of "negative" campaign advertising. But the very provisions of the act itself would create an unwieldy and perhaps chaotic system of control upon advertising done by and about candidates for political office.

Up to this point, I have attempted to state the case for the unconstitutional nature of the proposed act, and have stressed the impractical nature of S. 1310. However, the case against enactment of this legislation can also be made by simply looking at the types of advertising that will be curtailed if it is enacted . . . and the consequences of such a curtailment.

On September 22, Paul Taylor of the Washington Post examined this assault on so-called "negative" advertisements in an article entitled, "Dump on Your Opponent; Negative Campaign Ads Are as American as Don Rickles." States Taylor: "Attack ads are, for better or worse, the very dialogue of modern political campaigns. They are the place where the issues are joined, where images are shaped and reshaped, where appeals are boiled down to their essence."

Indeed, the public record of an incumbent federal candidate and his responsiveness or lack thereof to his constitutents is one of the few sources of unbiased material available to the general public with which to judge candidates for federal office. Advertisements which utilize such information as appears in the Congressional Record or other public documents are merely making such information more readily available by means of broadcasting.

More importantly, the consequences of the "Clean Campaign Act" will be to serve as a means for further protecting the reelection capabilities of incumbents. As Barry Lynn, legislative counsel for the American Civil Liberties Union, recently stated, "Most incumbents do not want to ever acknowledge the existence of challengers, much less refer to them in their advertising. However, challengers invariably dislike the incumbent's record and want to expose what they think is wrong with it, yet that is precisely the kind of message this bill will make broadcasters reluctant to air."

Several years ago, the liberal Americans for Democratic Action estimated that an incumbent House member has close to $500,000 in Government services that he can utilize in affecting his reelection. Congressional Quarterly, in a June 1983 article, "Campaign Reform No Boon to Challengers", put it this way:

"Sooner or later, campaign finance reformers will need to confront an issue that lurks behind every change in election spending laws proposed so far: the complaint that reform will simply work to the advantage of congressional incumbents. Already, some 95 percent of the members of the House are reelected every two years. This act would, as its consequence, actually strengthen the hands of incumbents by restricting the ability of challengers to critically attack the record of an incumbent."

Finally, the Clean Campaign Act of 1985 would serve to curtail and perhaps eliminate the participation of independent committees in the political process. Perhaps there is no potential consequence of the act more obnoxious than this one. By what divine right could Congress deem that it is only appropriate for candidates and their opponents to speak out on matters so critical to the American people as the election of the very Members of Congress? Founding Father James Madison surely foresaw the potential for such problems when, in the Federalist Papers, he noted that the "occasional regulation" of the election process, by Congress, would be "improper." As mentioned, Members of Congress have enormous advantages in running for reelection; we should not allow one of those advantages to be the ability of Congress to restrict who can and cannot comment on the records and abilities of each individual Member.

This last issue—the ability of independent forces, be they individuals or committees to participate in the electoral process—is a particularly important one for our committee, since we are such an independent vehicle and have spoken out during campaigns on a consistent basis. For close to five years, we fought an attempt by the Federal Election Commission to curtail our ability, and the ability of our donors, to express their feelings on presidential campaigns through the vehicle of independent expenditures. The restrictive efforts of the Federal Election Commission were finally and decisively rejected by the U.S. Supreme Court in a 7-2 ruling handed down this past March (Federal Election Commission, et al. v. Fund for a Conservative Majority et al., 84 L. Ed. 2d 455, 1985). In part, the Court, in its March decision, pointed out that allowing independent presentation of views, but shrouding them in impossible restrictions, "Is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."

It is our contention that the same principle applies here. The restrictions, in practicality, and the confusion produced by this act will undoubtedly have the effect of rendering independent committees and individuals working outside of official campaign committees unable to participate in the political process. The net result would be a less informed, less educated, voter.

There is no right more critical to the continuation of a free, open, and democratic system than the right of the voters to freely select their representatives to Congress. Restrictions and regulations of the kind proposed here would make it all the more difficult for the voters to exercise that right. Instead of prohibiting political action and hampering the ability of voters to decide for themselves what candidates are worthwhile and worthy of election or reelection, we suggest that we try a novel approach: an approach that worked well in this country for two full centuries. Let the voters themselves regulate the system by accepting or rejecting so-called "negative" advertising at will; accepting it, as they apparently did in a Kentucky Senate race this past election cycle, or rejecting it, as they apparently did in Maryland. Let the voters decide. Isn't that what democracy is all about?

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR HOLLINGS AND THE ANSWERS

Question 1. Do you support the Fairness Doctrine and the Equal Time Rule? Do you believe they are constitutional?

Answer. Although the constitutionality of both the Fairness Doctrine and the Equal Time Rule has been tested and both have been found to be constitutional, we have profound misgivings with regard to them. It is our strong feeling that any such restrictions do injustice to the intent of the first amendment.

Question 2. Do you believe any changes are needed to the Fairness Doctrine and the Equal Time Rule?

Answer. It is our feeling that the most productive approach to changing the Fairness Doctrine and the Equal Time Rule would be to phase both out over a period of time. However, specific changes should be made immediately. The most pressing would concern the distressing application of the Fairness Doctrine to campaign ads by independent groups. The Fairness Doctrine should not be used as a substitute for the Equal Time Rule simply because the individual or group running the spot in question is not a candidate or part of an official campaign committee.

Question 3. When you enter a campaign, how much of the entire amount you expend is devoted to airing broadcast spots?

Answer. When FCM is involved in an "independent expenditure", we spend a great deal of our resources on airing broadcast spots. Although that percentage varies from campaign to campaign, in 1984, for instance, we spent close to 40 percent of our $460,000 independent expenditure for Jesse Helms on broadcasting TV spots.

Question 4. Do you ever have difficulty in buying broadcast air time?

Answer. Independent committees such as the Fund for a Conservative Majority often have difficulty in buying broadcast air time. It should be noted that the rights that FCM and other independent committees, as well as independent candidates, have under the law are not the same as the rights of the major party candidates. Specifically, the lack of a right of access often allows television stations to censor or reject independent ads at will.

We do not necessarily advocate that the right of access be extended to all independent groups as this could perhaps prove impractical. But we do advocate that independent groups and committees should be treated the same as major party candidates. The Constitution was never meant to safeguard only the rights of political candidates to speak out on issues of national importance; all groups, individuals, and committees should have equal rights in that area.

Question 5. What rate do you generally pay for broadcast air time? Have you ever believed broadcasters were forcing you to pay unduly high rates?

Answer. Broadcast stations generally charge FCM and other independent committees the maximum rate for all time. We have often been forced to pay unduly high rates for such time. The cause of such rates is generally the fact that we have no legally established right of access combined with the apparent conviction of the broadcast station that we have no alternative in terms of using their air time.

Question 6. What is the duration of most of your broadcast spots? Why do you buy this duration?

Answer. Most FCM broadcast spots have been 30 second TV spots. We make most of our TV spots in 30 second increments because it is much easier to buy 30 second spots than other kinds. However, during the 1984 Presidential campaign, one of our most effective pro-Reagan independent expenditure TV spots was a 90 second TV spot.

Question 7. Do you consider negative advertisements more effective than supporting messages in influencing voters? Why so? Have you tested voter reaction to back up this conclusion?

Answer. The Fund for a Conservative Majority runs exclusively positive TV advertisements. However, we do believe that so-called "negative" advertisements should be afforded the same rights as any and all positive advertisements. The effectiveness of a particular TV spot does not depend upon whether it is positive or negative, but rather upon the message enclosed within the spot.

Question 8. When you run a broadcast spot, how do you identify your group? How much time do you devote to this identification?

Answer. The Fund for a Conservative Majority is identified as a sponsor of all spots which we run.

[Whereupon, at 11:54 a.m., the committee was adjourned.]

[The following information was subsequently received for the record:]

Statement of the American Association of Advertising Agencies

This statement is respectively submitted by the American Association of Advertising Agencies, the national trade association representing the advertising agency business. This association includes within its membership more than 675 advertising agencies nationwide, who place more than 75 percent of all advertising placed through agencies in this country.

The members of this association share with the sponsors of this bill a great concern with the quality of the advertising presented by candidates for office during political campaigns. That concern relates to the effect on public attitudes toward our political system and toward advertising which is generated by political advertising—a form of advertising which is subject neither to the same governmental rules and regulations as other advertising nor to the stringent self-regulation imposed on the industry by the media and by its own systems and procedures.

The association applauds the basic concept that any candidate who seeks to attack his or her opponent should do so in person rather than through any third party or through some audio/visual concept or device. We believe, however, that to legislate the provision of free response time by the broadcaster to the opposition candidate is a step that is both undesirable and impractical. We also believe that to legislate free response time when an independent advertisement is placed by a Political Action Committee or an individual is equally undesirable and impractical.

Such legislation is undesirable and impractical from a First Amendment standpoint, for by mandating "free response time" it would restrict the rights of broadcasters and tend to prevent citizens from subjecting candidates to a close scrutiny of their positions on issues. We know from experience that free response time does not in fact bring additional voices to the marketplace of ideas but, instead, closes down the marketplace to all sides on a given issue. (Such experience is cited extensively in the Federal Communications Commission's General Notice of Inquiry on the Fairness Doctrine; it lists 45 examples of the "chilling" effect that free response time has had on free speech. In such instances, experience has shown, the broadcaster, anticipating the large quantities of free air time that he may be required to provide to all parties concerned over a controversial issue, refuses to carry advertising on the issue in the first place.)

Conclusion: We share the concern over negative broadcast advertising by political candidates, but we cannot agree that mandated free response time is legal or desirable under the First Amendment, as it would restrict the rights of broadcasters; nor can we agree that it is practical, as it would have a "chilling" effect on the broadcast of issue-oriented advertising.

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